THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

DUDLEY B. BONSAL, *President* — PAUL B. DE WITT, *Executive Secretary* — ROGER BRYANT HUNTING, *Secretary*

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Association Activities

THE MANAGEMENT, House and Bar Building Committees, with a rare example of intra-mural cooperation, have by their joint efforts effected as of February 1, 1959, a transfer of the Stenographic Bureau from an Association operation on the fourth floor to an independent operation under the management of William Newrock, an experienced court reporter, in new and enlarged quarters on the second floor of the Bar Building. To assure a continuation of the high standard of work on the stenographic end, Mr. Newrock has engaged Miss Price and her entire staff who have so efficiently for so many years run the Bar Association Stenographic Service. Mr. Newrock's own experience promises first quality reporting. It is the hope of the House Committee that members will be served by Mr. Newrock as well as they have been by Miss Price.

AT THE January Stated Meeting the Association adopted unanimously the following resolution:

> RESOLVED, that The Association of the Bar of the City of New York endorses the recommendations of the Judi-

cial Conference of the State of New York for modernization of the court structure in the State of New York and urges their prompt enactment by the Legislature.

William C. Chanler, Chairman of the Association's Special Committee on the Administration of Justice, offered the resolution following the presentation of his Committee's report, which is printed in this issue of THE RECORD.

The Association also voted to approve certain changes in the By-laws. Interim reports were received from Theodore Pearson, Chairman of the Library Committee; Bethuel M. Webster, Chairman of the Special Committee to Cooperate with the International Commission of Jurists; and Richard H. Wels, Chairman of the Special Committee on Improvement of Family Law.

As EXAMPLES of fine typography three publications of the Association were selected for display at the annual meeting of the New York Employing Printers Association: THE RECORD (October), the Memorial Book (1958) and the brochure on the activities of the Association (1958). The brochure in addition received an "Award of Special Merit" and the Association has been given an engrossed Certificate of Award by the New York Employing Printers Association. All three publications were printed by the Harbor Press, Inc.

THE PRESIDENT of the Association attended the National Conference on the Continuing Education of the Bar held December 16–19 at Arden House. The conference was attended by 110 Bar officials, lawyers, judges and law professors. In a series of small group discussions the members of the conference examined the problems involved in extending the scope and of improving the quality of continuing legal education. At the concluding plenary session a consensus was adopted which included some of the following recommendations: The practicing lawyer "has an obligation to continue his education throughout his professional life"; the primary obligation to make continuing education available

rests with the organized bar; future programs of continuing legal education should, in addition to courses aimed at improving professional competence, also place greater emphasis than in the past on the public responsibility aspects of law practice.

OVER 800 MEMBERS and guests attended the Annual Twelfth Night Party sponsored by the Committee on Entertainment, Eugene A. Leiman, Chairman, which honored Judge Harold R. Medina. Joseph N. Welch of Boston acted as Master of Ceremonies.

THE COMMITTEE on Real Property Law, Mendes Hershman, Chairman, with the approval of the Executive Committee, will propose amendments to Section 255 of the Tax Law. The amendments will avoid the effect of possible court decisions requiring the payment of a mortgage tax on extension agreements where no tax was previously due.

The Committee will also sponsor a symposium on "The How and Why of Real Estate Cooperatives" at 8:00 P.M. in the Meeting Hall of the Association on Tuesday, February 10. Mr. Hershman will act as Moderator. Speakers and their topics will be: Lewis M. Isaacs, Jr., legal background and development of cooperatives; Stephen S. Bernstein, formation and handling of cooperatives from the viewpoint of the seller; Edward G. McLaughlin, the corporation and its stockholders; Herman Jervis, the role of the individual stockholder; Lester R. Bachner, tax problems; and Eugene J. Morris, middle-income cooperatives.

ARTHUR H. DEAN, Chairman of the United States Delegation to the Geneva Conference on the law of the sea, was a guest of the Committee on International Law, John R. Stevenson, Chairman. Mr. Dean discussed the problems of the Conference and the results achieved. A general discussion followed at the conclusion of Mr. Dean's remarks, particularly with regard to the treatment

of flags of convenience in Article 5 of the Convention of the High Seas, the prospects for ratification of the Conventions and aspects of the law of territorial bays.

THE COMMITTEE on Foreign Law, James N. Hyde, Chairman, is continuing its study of the European Economic Community. The study will concentrate on problems which are of particular concern to the New York lawyer in dealing with these communities. A bibliography will be prepared in cooperation with the Librarian of the Association.

THE PRESIDENT of the Association was a member of the American delegation attending the International Congress sponsored by the International Commission of Jurists at New Delhi, India from January 5 to 10. Representatives from 53 countries of the free world were present. The purpose of the Congress was to determine and give expression to those principles of law which are deemed essential to the protection of the individual citizen in a free society. A statement of these principles will give a practical application to the concept of the "Rule of Law" which is recognized by the representative legal systems of the non-Communist world. It will also serve as a text for lawyers of both developed and underdeveloped countries in meeting their responsibility of protecting individual rights against encroachment by governments. In addition to Mr. Bonsal, the American delegation included Bethuel M. Webster, Herbert Brownell, Jr., Justice Harold A. Stevens, Robert G. Storey, Charles S. Rhyne, Ernest Angell, Florence M. Kelley, Homer G. Angelo, Robert R. Bowie and Laurence M. Lumbard.

RECENT MEETINGS sponsored by various Sections of the Committee on Post-Admission Legal Education, Ernest A. Gross, Chairman, were:

"The Drafting of a New Civil Code for the Netherlands" was sponsored by the Section on Jurisprudence and Comparative

Law, Samuel C. Coleman, Chairman. The speaker was Professor Isaak Kisch of the University of Amsterdam.

Under the joint sponsorship of the Section on Trade Regulation, Edward L. Rea, Chairman, the Committee on Trade Regulation, E. Nobles Lowe, Chairman, and the Committee on Patents, Floyd H. Crews, Chairman, Bartholomew Diggins and R. Morton Adams discussed "Antitrust and Misuse Defenses to a Patent Infringement Suit."

"Selecting the Court—State or Federal?" was the subject of a meeting sponsored by the Section on Litigation, Paul W. Williams, Chairman. The speaker was Orison S. Marden.

Sheldon V. Ekman spoke on "Use of Private Annuities in Estate Planning" and Edward R. Finch, Jr. reviewed recent decisions at a meeting of the Section on Wills, Trusts and Estates, Joel Irving Friedman, Chairman.

"Problems Under the Welfare and Pension Plans Disclosure Act" were discussed by Stuart Rothman, Solicitor of Labor, United States Department of Labor, at a meeting of the Section on Labor Law, I. Robert Feinberg, Chairman.

A GOAL of $576,000 to meet The Legal Aid Society's 1959 budget was announced by Chauncey B. Garver, General Chairman of the fund raising effort. The Campaign opened on Thursday afternoon, January 15.

In announcing the goal, Mr. Garver said: "To secure and protect the legal rights of those who cannot afford to pay a lawyer for advice and representation is not merely humane; it is a fundamental obligation in a free society which boasts of equality under law.

"The increasing numbers of those who turn to and rely upon Legal Aid and the mounting costs of providing the equality of service they deserve necessitate an ever larger annual budget. In 1959, in order to maintain our eight offices throughout the City, staffed by fifty-four full-time attorneys and forty-five office personnel, $576,000 will be needed. I am sure that public spirited New Yorkers realize the importance of this work and will make

it possible for us to meet our obligation to their less fortunate neighbors."

THE PUBLISHERS of the following Law Lists and Legal Directories have received Certificates of Compliance from the Standing Committee on Law Lists of the American Bar Association for their 1959 editions:

Commercial Law Lists

A. C. A. LIST
Associated Commercial Attorneys List
165 Broadway
New York 6, New York

THE AMERICAN LAWYERS QUARTERLY
The American Lawyers Company
1712 The Superior Building
Cleveland 14, Ohio

THE B. A. LAW LIST
The B. A. Law List Company
759 North Milwaukee Street
Milwaukee 2, Wisconsin

THE CLEARING HOUSE QUARTERLY
Attorneys' National Clearing House Company
3539 Hennepin Avenue
Minneapolis 8, Minnesota

THE COLUMBIA LIST
The Columbia Directory Company, Inc.
320 Broadway
New York 7, New York

THE COMMERCIAL BAR
The Commercial Bar, Inc.
521 Fifth Avenue
New York 17, New York

THE C-R-C ATTORNEY DIRECTORY
The C-R-C Law List Company, Inc.
15 Park Row
New York 38, New York

FORWARDERS LIST OF ATTORNEYS
Forwarders List Company
38 South Dearborn Street
Chicago 3, Illinois

THE GENERAL BAR
The General Bar, Inc.
36 West 44th Street
New York 36, New York

THE INTERNATIONAL LAWYERS
International Lawyers Company, Inc.
33 West 42nd Street
New York 36, New York

THE NATIONAL LIST
The National List, Inc.
122 East 42nd Street
New York 17, New York

RAND MCNALLY LIST OF BANK RECOMMENDED ATTORNEYS
Rand McNally & Company
P. O. Box 7600
Chicago 80, Illinois

WRIGHT-HOLMES LAW LIST
Wright-Holmes Corporation
225 West 34th Street
New York 1, New York

General Law Lists

AMERICAN BANK ATTORNEYS
American Bank Attorneys
18 Brattle Street
Cambridge 38, Massachusetts

THE AMERICAN BAR
The James C. Fifield Company
121 West Franklin
Minneapolis 4, Minnesota

THE BAR REGISTER
The Bar Register Company, Inc.
One Prospect Street
Summit, New Jersey

CAMPBELL'S LIST
Campbell's List, Inc.
905 Orange Avenue
Winter Park, Florida

INTERNATIONAL TRIAL LAWYERS
Directory Publishers, Inc.
84 South Cherry Street
Galesburg, Illinois

THE LAWYERS' LIST
Law List Publishing Company, Inc.
521 Fifth Avenue
New York 17, New York

MARKHAM'S NEGLIGENCE COUNSEL
Markham Publishing Corporation
Markham Building
66 Summer Street
Stamford, Connecticut

RUSSELL LAW LIST
Russell Law List
10 East 40th Street
New York 16, New York

General Legal Directory

MARTINDALE-HUBBELL LAW DIRECTORY
Martindale-Hubbell, Inc.
One Prospect Street
Summit, New Jersey

Insurance Law Lists

BEST'S RECOMMENDED INSURANCE ATTORNEYS
Alfred M. Best Company, Inc.
75 Fulton Street
New York 38, New York

HINE'S INSURANCE COUNSEL
Hine's Legal Directory, Inc.
P. O. Box 71
443 Duane Street
Glen Ellyn, Illinois

THE INSURANCE BAR
The Bar List Publishing Company
State Bank Building
Evanston, Illinois

THE UNDERWRITERS LIST OF TRIAL COUNSEL
Underwriters List Publishing Company
308 East Eighth Street
Cincinnati 2, Ohio

Probate Law Lists

THE PROBATE COUNSEL
Probate Counsel, Inc.
First National Bank Building
411 North Central Avenue
Phoenix, Arizona

SULLIVAN'S PROBATE DIRECTORY
Sullivan's Probate Directory, Inc.
84 South Cherry Street
Galesburg, Illinois

State Legal Directories

Publisher—The Legal Directories Publishing Company, Inc.
1072 Gayley Avenue, Los Angeles 24, California

Alabama, Florida and Georgia Legal Directory

Arkansas, Louisiana and Mississippi Legal Directory

Carolinas and Virginias Legal Directory

Delaware-Maryland and New Jersey Legal Directory

Illinois Legal Directory

Indiana Legal Directory

Iowa Legal Directory

Kansas Legal Directory

Kentucky and Tennessee Legal Directory

Michigan Legal Directory

Minnesota-Nebraska, North Dakota and South Dakota Legal Directory

Missouri Legal Directory

Mountain States Legal Directory (for the States of Colorado, Idaho, Montana, New Mexico, Utah and Wyoming)

New England Legal Directory (for the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont)

New York Legal Directory

Ohio Legal Directory

Oklahoma Legal Directory

Pacific Coast Legal Directory (for the States of Arizona, California, Nevada, Oregon and Washington)

Pennsylvania Legal Directory

Texas Legal Directory

Wisconsin Legal Directory

Foreign Law Lists

Butterworths Empire Law List
Butterworth & Company (Publishers) Ltd.
88 Kingsway
London, W. C. 2, England

Canadian Law List
Cartwright & Sons, Ltd.
2081 Yonge Street
Toronto 7, Ontario, Canada

Carswell's Directory of Canadian Lawyers
The Carswell Company Limited
145–149 Adelaide Street West
Toronto 1, Canada

The International Law List
L. Corper-Mordaunt & Company
Pitman House
Parker Street
London, W. C. 2, England

Kime's International Law Directory
Kime's International Law Directory, Ltd.
102-A Southampton Row
London, W. C. 1, England

The Calendar of the Association for February and March

(as of January 30, 1959)

February	2	Dinner Meeting of Committee on Professional Ethics
February	3	Meeting of Committee on the Surrogates' Courts Meeting of Committee on State Legislation
February	4	Dinner Meeting of Executive Committee Meeting of Section on Wills, Trusts and Estates
February	5	Dinner Meeting of Committee on the Bill of Rights
February	9	Dinner Meeting of Committee on Medical Jurisprudence Dinner Meeting of Committee on Federal Legislation Meeting of Committee on the Domestic Relations Court
February	10	Meeting of Committee on Real Property Law Symposium: "The How and Why of Real Estate Cooperatives" 8:00 P.M. Meeting of Committee on State Legislation Dinner Meeting of Committee on Labor and Social Security Legislation
February	11	Dinner Meeting of Committee on International Law Dinner Meeting of Committee on the Bill of Rights Meeting of Section on Administrative Law
February	16	Meeting of Library Committee Meeting of Section on Litigation Meeting of Special Committee to Cooperate with the Family Part of the Supreme Court of New York County
February	17	Dinner Meeting of Committee on Insurance Law Forum of Committee on Insurance Law Dinner Meeting of Committee on Courts of Superior Jurisdiction Meeting of Committee on State Legislation

February	18	Meeting of Committee on Admissions Dinner Meeting of Committee on Trade Marks and Unfair Competition Dinner Meeting of Committee on Legal Aid Meeting of Committee on Foreign Law Dinner Meeting of Committee on Municipal Affairs
February	19	Meeting of Committee on Arbitration Dinner Meeting of Committee on Copyright
February	24	Meeting of Section on Banking, Corporation and Business Law Meeting of Committee on State Legislation
March	2	Dinner Meeting of Committee on Professional Ethics Dinner Meeting of Committee on Art Dinner Meeting of Committee on the Domestic Relations Court
March	3	Meeting of Committee on State Legislation
March	4	Dinner Meeting of Executive Committee Meeting of Section on Wills, Trusts and Estates
March	5	Meeting of Section on Taxation
March	9	Meeting of Section on Taxation
March	10	*Stated Meeting of the Association* Meeting of Committee on State Legislation
March	11	Meeting of Section on Labor Law Dinner Meeting of Committee on International Law Dinner Meeting of Committee on the Bill of Rights Dinner Meeting of Committee on Federal Legislation
March	16	Meeting of Library Committee Meeting of Section on Jurisprudence and Comparative Law
March	17	Dinner Meeting of Committee on Copyright Meeting of Committee on State Legislation
March	18	Meeting of Committee on Admissions Dinner Meeting of Committee on Trade Marks and Unfair Competition Meeting of Section on Corporate Law Departments Dinner Meeting of Committee on Foreign Law Dinner Meeting of Committee on Courts of Superior Jurisdiction

March	19	Dinner Meeting of Committee on Aeronautics Dinner Meeting of Committee on Municipal Affairs Meeting of Section on Trade Regulation
March	23	Dinner Meeting of Special Committee to Cooperate with the Family Part of the Supreme Court of New York County Dinner Meeting of Committee on Medical Jurisprudence
March	24	Dinner Meeting of Committee on State Legislation Meeting of Committee on Arbitration
March	30	Meeting of Section on Litigation
March	31	Dinner Meeting of Committee on Insurance Law Meeting of Committee on State Legislation

The President's Letter

To the Members of the Association:

By a unanimous vote the Stated Meeting of January 20 approved the following resolution proposed by the Special Committee on the Administration of Justice:

> RESOLVED, that The Association of the Bar of the City of New York endorses the recommendations of the Judicial Conference of the State of New York for modernization of the court structure in the State of New York and urges their prompt enactment by the Legislature.

I am sure this action by the Stated Meeting accords with the views of the overwhelming majority of our members. But good resolutions are not enough. We must now convince the members of the legislature that the action of this Association is an expression of the growing demand, not only by lawyers and judges, for an effective and modern system of justice, but also by the people of the State of New York. This can best be done by letters and personal appeals to individual members of the legislature.

I have just returned from a conference in New Delhi, India sponsored by the International Commission of Jurists and attended by judges, lawyers and teachers of law from 53 countries. The conference in its Declaration of Delhi enunciated for the first time the principles which constitute the Rule of Law in a free society. We here enjoy the benefits of a government by law. Our example is an inspiration to many who do not live under a rule of law, but as Chief Justice Hughes pointed out, "You cannot maintain democratic institutions by mere forms of words or by occasional patriotic vows. You maintain them by making the institutions of our Republic work as they are intended to work."

DUDLEY B. BONSAL

January 15, 1959

The Why and the How of Real Estate Syndications

INTRODUCTION

By MENDES HERSHMAN

May I welcome you on behalf of the Real Property Committee of The Association of the Bar of the City of New York to this inaugural of the Committee's panel discussions of major contemporary problems exercising the real estate bar. Real estate syndication must be one of these to have convoked such a vast assemblage in this great hall, overflowing into the foyer and rooms outside.

Most of you remember the dear dead days beyond recall when real property lawyers were concerned solely with conveyancing—marketability of title, easements, profits a prendre and covenants running with the land, conditional limitations and conditions subsequent—when Blackacre was a solid segment of the earth's surface, not a sheaf of securities.

Then you will recollect that out of the matrix of World War II issued the dreadful twins, debt and taxes, and the lawyer found his investing real estate client had one obsession—net return after taxes. Conveyancing became computing and will drafting estate planning.

For the lawyer with an individual client ready to acquire a whole property, net return was a tax problem not seriously complicating the conveyancing or business problems; e.g., should he take title in his own name or with his wife or in corporate form because in his tax bracket the corporation's income tax plus the subsequent capital gains tax when the corporation is liquidated was less than the tax he would pay if he took title? Is the capitalization too thin; must he hold the real estate for three years because the corporation is "collapsible?" But then came a form

Editor's Note: The papers published here were presented before a forum sponsored by the Committee on Real Property Law, of which Mendes Hershman is Chairman.

of ownership of real estate in which the solution of the tax problem complicated all other problems.

Not too many years ago to a few prescient lawyers and business men it became clear that investment in important structures could not be a lone hand venture and particularly when mortgage money became too tight or too expensive. Furthermore while in the first place the big fellow was worrying about how to prevent the tax problem from reducing him to a little fellow, the latter was aching to get into a real estate venture where, as Carl Schlitt of this Committee once remarked, he "could make enough money to worry about the tax problem in the first place."

And so real estate syndication was born and the leading obstetricians who attended the parturition are present on this panel this evening. The baby is reaching a rich manhood in an amazingly short period. Its significance in the world of real estate financing should not be lost on the real property bar.

Inasmuch as only in that rare instance where all the owners of the multiple interests are in extremely high tax brackets and their corporate vehicle for ownership in a lower bracket may the corporation be the taxwise vehicle, other forms had to be devised that would eliminate the corporate tax yet retain the business and conveyancing virtues of the corporation—limited liability, continuity, liquidity.

To tell us the Why and How of Real Estate Syndication we have gathered here a most knowledgeable panel—

Harry Helmsley, 1957's Real Estate Man of the Year who has only to drive down a street for real estate values on both sides of the street to start picking up; who has placed real estate valued at about a half billion dollars with investment syndicates; member of the governing board of the Real Estate Board of New York; his firm, Helmsley-Spear, is at the very pinnacle of the real estate industry in our town.

Lawrence A. Wien, distinguished lawyer, senior member of the law firm of Wien, Lane, Klein and Purcell, and one-time member of the Real Property Committee of this Association, the Times report of last Friday said of him—"Mr. Wien is the head of private realty investing syndicates with holdings throughout

the country valued at about $500,000,000." His investment groups control some of the most important hotel, office and loft buildings in major cities across the nation. He is responsible in no small measure for the development of the complex financial and legal techniques in a major prototype of real estate syndication. I am inclined to believe that his principal problem is to fend off potential investors pining away to participate in a Wien syndication. A very substantial part of his day is spent in the leadership of great philanthropic causes to which he devotes much of his time and energy and personal fortune. Chairman of Federations' 1958–59 Campaign, Trustee of Brandeis University and Chairman of its National Development Council, member of the Board of Visitors of Columbia Law School, his community activities are legion and legendary.

Louis Greenblatt, also a leader of the real property bar, lecturer for the Practicing Law Institute, and a member of this Committee, is a partner in the firm of Tenzer, Greenblatt, Fallon and Kaplan, and has been eminently successful in the organizing of syndicates for the acquisition and operation of important office and apartment buildings aggregating an equity investment in excess of $50,000,000 with approximately 1,000 investors. Louis' syndications may lack flamboyancy but never hard currency.

Since at the heart of the matter is our century's phobia—the income tax—we of course could not have a panel without the tax expert. I have always thought that an expert is a fellow at least 50 miles away from home but Harry Janin is regarded as a tax expert from New York to Oregon with stops at New Orleans and Denver where he has lectured at tax institutes and indeed even in Washington, D.C., at the fountainhead, where he works on the Advisory Committee to the Ways and Means Committee that authors the tax laws. Harry is a member of the eminent accounting firm of Eisler & Lubin and a member of the Committee on Real Property Law of this Association.

Finally, we are fortunate in having with us this evening Mr. Milton P. Kroll, member of the bar of New Jersey and Washington, D.C.; lecturer in law at the George Washington University Law School; formerly Associate General Counsel of the U.S.

Securities & Exchange Commission, who will complete the syndication picture with his intimate knowledge of the regulatory aspects.

Each of the members of the panel will in turn make a brief presentation of certain aspects of syndication which I have had the temerity to assign. This will be followed by an interchange among the members of the panel if they see fit so to do and we will then end up with questions from the floor.

We will start with Mr. Helmsley who will give us something of the economics of real estate syndication. He will be followed by Mr. Wien who will outline the How of syndication particularly of the "Wien" type with brief references to the functions and compensations of the syndicate manager, problems of continuity of the enterprise, marketability of the shares, what the participant should look for and legal aspects as reflected in the documentation.

Mr. Greenblatt will follow Mr. Wien and cover much the same aspects of syndication as we will have heard from Mr. Wien but from the point of view of the "Greenblatt" and other types, comparing the same problems in the different types of syndication.

Mr. Janin will follow Mr. Greenblatt. May I add that even Mr. Janin cannot hope, in the time allotted, to do more than hit high spots. He could spend an entire evening on depreciation and obsolescence, or on thin and collapsible corporations, or the tax on promotorial profit and the sharing of depreciation benefits.

Finally Mr. Kroll will give us the applicability of the S.E.C. Act and Blue Sky laws to syndication, what to do, who is exempt, penalties and the pros and cons of regulation.

BUSINESS ASPECTS

By HARRY B. HELMSLEY

The mere fact that you are here indicates that you are familiar with the importance of syndication in the real estate field. Syndicates have become an increasingly large factor in the sale of real estate and I venture to say that most of the large buildings will eventually be owned through this type of ownership.

Let us define syndication. Today's real estate man will define a syndicate as a group formed for the purpose of acquiring a property where the money is predominantly investment in character and where the individuals are not professional real estate purchasers.

From my own experience, I can see the trend. Over the past ten years, our firm has sold over five hundred million dollars worth of property to syndicate groups and we know that there are unlimited funds waiting for investment in the proper security. The difficulty arises in obtaining the proper investment. This is why I am here. I don't syndicate properties. That is done by others. I act as a broker and manager for the syndicator. We have a staff of two hundred people. Some of them are engaged in management—some of them in sales. To find the right deals, we have people travelling over the country and we do national advertising and local advertising. We are constantly analyzing investments that are submitted to us to see whether they are suitable for a sale to a syndicate.

Generally speaking, I would say that to be suitable for investment by a syndicate a property should show a return on equity of better than 12%. This does not mean that you can go out and find property which is being offered to you which will show you 12% or better. There are very few properties which are offered on that basis. The value must be created in most instances. Value is created either through management, through refinancing, or through a potential in the future which can be visualized. Generally speaking, I would say that a property must earn, as if free and clear, between 9% and 10% in order to give the proper yield.

If the property only earns 9% as if free and clear, then it is necessary to see how financing can be worked out in order to give the proper yield on equity. If we assume that we can get a sale-leaseback position from an institution for 80% of the purchase price and that this would be obtainable at 7½%, we have 6 points for 80% of the yield. This leaves us 3 points for 20% of the yield or 15% on equity which is sufficient for our needs. This would make it possible to purchase on a 9-point free and clear yield. However, if you can only finance on the basis of a first mortgage

and you can only contemplate a 60% mortgage, at 8% overall, then you have 4.8% for 60% and you will need 13 points on the 40% equity position which is 5.20% or 10 points overall.

Types of property which are best suited for syndication are hotels, office buildings, and loft buildings. Apartment houses, for the most part, do not give a sufficient yield. The average syndicate pays about 12%. It is very difficult to find any apartment project which will pay better than 10% on equity.

In order to provide these yields, properties are often set up with a subleasing group. This subleasing group takes over the management of the property and leases back at a sufficient net return to give the 12% yield to the investor. In many cases, the lease is paid for. In other cases, the lease is guaranteed for a specific period of years in lieu of payment. The creation of this sublease provides for ease of management. It avoids the necessity of the participants in the larger syndicate doing business. All they do is collect one rent and divide it. This helps to avoid any possibility of a partnership doing business as a corporation.

I recommend that properties to be syndicated be purchased either subject to a first mortgage or at least subject to mortgages that are not higher than the equivalent of a first mortgage. This provides for safety and at the same time, it provides the possibility of refinancing. Most times refinancing is done by going to the institution and cutting down on the amortization that is called for. You can readily see that where there are constant payments which start out at 5% interest and 2% amortization or 2½% amortization, that at the end of the fifth year the ratio has started to change so radically that the amortization is much higher than the original 2% to 2½%, probably going as high as 3% or 4%. At that point, it is very often possible to go to the mortgagee and convince him that it is not necessary to have such high amortization, that the amortization should be reduced; thereby, the net yield to the investor increases from the 12% to a higher rate. It is interesting to note that this higher rate comes in the form of tax-free income as the depreciation remains the same and such depreciation provides a tax-free shelter over the income.

You are probably familiar with the fact that in most syndicate setups the depreciation is higher than the amortization and that this provides a tax-shelter or umbrella over the income to the investor. Sometimes it is equivalent to 25% and other times it goes as high as 50% of the net return as being tax-free.

In this country we seem to be in a period of gradually increasing prices. There appears to be a built-in inflationary spiral. Labor contracts always call for additional benefits for the workers regardless of whether this is offset by increased production. In addition, we have an expanding population and a national debt which is certainly not getting any lower. At the present time, it is unbalanced to the tune of twelve billion dollars per year. A progressive inflation of this type has a tendency to offset any depreciation. Therefore, while the amortization of the mortgages is intended to be equivalent to the depreciation of the property, we find that this is not the case and the amortization in effect is recaptured from time to time through refinancing.

I could go on indefinitely talking about the various ramifications of deals that we have made. But I do want to say this, and I think this is the most important single fact that I can leave with you. The most important part of the syndication is the character and integrity of the person who is making the syndication. The syndicate manager who has the interest of his investor at heart and who will only syndicate property which is well located, conservatively financed and with a good potential is doing a favor to his investor and is building up a happy future for himself.

HOW THE SYNDICATE FUNCTIONS

By LAWRENCE A. WIEN

First of all I imagine we ought to take a look at the word "syndicate." It is a very loosely used term and applies, in the minds of most of us, to almost any group, any large or small collective group, which joins in an investment in real estate, or an industrial enterprise, or almost anything. There are many so-called syndicates which own property as partners or in corporate

form, but the type of syndicate investment, primarily in real estate, with which we are concerned this evening, is that of the large group, who share the ownership of a position in real estate, and set up a procedure which enables them to hold this investment, planned as a permanent investment.

Years ago when we began this, I tried various forms of ownership. There was a time when we used only corporations. Subsequently we were guided by a decision which involved the Cleveland Trust Company and which went to the United States Court of Appeals. Later an application for a Writ of Certiorari was made and was denied. The trust form which was sustained in that suit was the guiding form for us for a period of time, but we found that it created other problems for us in the State of New York because our trust laws are not the same as the trust laws in the State of Ohio; so gradually we evolved a program which we have followed for some years now, which I would like to describe to you because I think it is simple and readily understandable.

We create a general partnership. The title of the property is held by a general partnership consisting of two or more individuals. Each partner then executes a joint venture agreement with a group of participants for whom he acts as agent. These agreements give the names of the people involved, they provide for successors for the agents, who are named individuals, or if these named individuals are not available, for the designation of a successor by a percentage, (usually 75 per cent) of all the participants in this joint venture which owns the partnership interest, of one of the general partners. The agreements also provide that the interest of a participant is transferable under certain conditions. There is provision for an assumption of the terms of the joint venture agreement by the assignee, and other procedural requirements.

Every large real estate syndication investment which we create is said not to be engaged in business. You will hear more about the possibility of being subject to corporate tax from Harry Janin, but the one thing that we decided must be certain was

that the syndicate group did not operate real estate and did not conduct a business, but owned property which was leased to some individual, corporation or partnership which was actually engaged in the operation of the property and thus in the operation of the business.

What is the function of a man who creates the investment, whom we might call a syndicate manager, for want of a better term? I don't like it as applied to myself, but I am called that, I guess, by a few people, so I will accept the designation even though I am not fond of it. His first job is to analyze and perfect the deal, if it doesn't shape up exactly as he would like it to, in order to have a suitable investment.

How do you do this? Well, first of all you get expert guidance. But you cannot depend upon expert guidance alone, because the motivating factors of the individuals involved differ. A man who comes to you with a piece of property and says, "This is suitable for investment," is normally a broker who is interested in making a commission. He is not responsible beyond his relationship to you. You have responsibility to the people who participate in the investment.

So you have to determine what the income of the property is on a free and clear basis; you have to determine what financing can be arranged, and whether this financing is conservative; whether it is abnormal financing which cannot be replaced. If it is for a period of 10 or 15 years and there is a balloon at the end of the period, you may not be able to go out and find the money to meet the balance. It may be necessary for you to create a self-liquidating mortgage to insure that you have no subsequent problem of refinancing.

Then you have to find someone who will be the lessee. Sometime you can't find someone, you may have to create someone. It may be an individual or a group who will undertake the actual operation of the property. You have to know whether or not you can present to them a program which is sufficiently attractive to induce them to execute a lease.

Then you have to provide security for the participants by mak-

ing certain that the lessees in possession have an actual equity which insures that they are not going to milk and drop the property.

Then you must also make provision for the supervision of the property after the investment is set up. In other words, from our standpoint it is most essential that every investment provide adequate income to pay substantial supervisory fees, because there is a tremendous amount of work which must be done by the syndicate manager or supervisor after the property is acquired and the investment is created. I will describe some of those activities in a moment.

After you have analyzed the property, what happens next? Well, you next execute a contract to buy the property, and you put up some money, and it is your money you put up and you take the initial risk.

This may not seem like a great risk, but I have had the experience of putting up a million dollars as a deposit on a purchase and I have been very much concerned about the possibility of losing the million dollars which was deposited—and this is added to the care that I have tried to exercise in insuring that the investment was a sound one, in which a great number of people would wish to participate.

Normally, as those of you who have real estate experience know, the cash required for the deposit runs about ten per cent of the ultimate cash investment in the property from the standpoint of the seller. In other words, if he is selling a piece of property for ten million dollars, he would like to get a million dollars deposit. Of course, if you are buying subject to a mortgage, it is much less, but in many instances you must buy a property free and clear and arrange your own financing and put up a large deposit of ten per cent of what the seller receives, even though your ultimate cash involvement will be considerably less than ten times the deposit.

Then you run up against another problem. Syndicated investments require time. Normally, in real estate, the usual period between the signing of a contract and the closing of title runs 30 or 60 days. When you tell the average seller you want four

months or five months or six months between your contract and closing, there is immediate objection and many deals cannot be made if you insist that this time is necessary. What do you do? Well, you arrange to close title if you can, without taking the steps necessary to complete a syndication. You may have to provide the funds from other sources, take title and close, and syndicate subsequently. We have had occasion to use some rather ingenious devices, where we have run up against some difficulties, to avoid losing a very worthwhile investment because of the objections raised by a seller to the period of time between a contract and the closing of title.

When you sign a contract, or after you take title if you are going to syndicate subsequently, you then are obliged to make certain that you comply with the laws relating to securities. This is a subject which Milton Kroll of Washington will tell you about. In the early days there was a great deal of uncertainty as to whether or not this was a security and whether or not this was subject to the regulations of the Securities and Exchange Commission. We have solved that problem in our office. We take the position that these are securities and anything that we create must be registered with the S.E.C. I think this is a wise policy. I realize this invloves expense and delay, but I am convinced that it is most essential for the public that adequate governmental control be achieved, and as far as I am concerned, at the present time that can only be found in the Securities and Exchange Commission.

I would now like to tell you a little about what a syndicate manager does in supervising the completed investment. First, he has periodic physical examinations made. We have men who at least every six months visit every property in which a group of participants have an investment with us. We have a staff that supervises the insurance which is received in these investments. When you own property which is leased, it is essential that you see that you have the required insurance, both as to the amount and form. Someone has to check the policies to see that certain exceptions do not crop up which could lead to considerable trouble in the event of a loss, and this becomes quite a job.

We prepare and file S.E.C. reports. We prepare the annual income tax returns for the partnership, the information returns, and we distribute to every participant information as to the taxes he must report. This involves some problems. We run up against the difficulty occasionally of a difference in the taxable income in the State of New York and Federal returns, because of different rules of depreciation. We cannot use the declining balance method of depreciation for the State of New York, and sometimes, when the declining balance method is used, participants have to report a greater income on their New York income tax returns than they do on their Federal tax returns.

There are other forms of taxes. There are other tax reports which must be filed, such as sales tax reports. If you own a hotel and it includes furnishings, and these furnishings are leased to an operating individual or group, they often pay sales tax to the owner, who in turn must file a report with the proper authority and pay tax.

Then comes the question of tax review. The Internal Revenue Department reviews the tax returns from time to time, and it is our job to represent the owning group in any discussions or negotiations with the representative of the Internal Revenue Office.

Of course, we likewise see that the rent is paid and we make whatever payments are required on mortgages and for ground rent or anything of that nature. The balance is distributed regularly. We do it on a monthly basis to each of the participants.

There is another factor. In many leases there is a provision in order to protect against inflation, a provision which we have developed because of the possibility of extreme inflation when the dollar might be worth very little. We provide that additional rent is payable if the profit of the lessee exceeds a certain amount. So we get the regular reports of operations from the lessee and determine whether they have reached the point at which there is a division of profits as additional rent.

There must also be a constant review of financing, the relationship between depreciation and mortgage amortization, which means this: Ever since the depression the institutions, the banks

and the insurance companies, have gone in for fixed annual payments for interest and amortization. Incidentally, this is a most excellent device to avoid the kind of situation we had in the depression. But as you make a constant payment monthly or quarterly, and the principal balance is reduced, the percentage of the payment attributable to interest becomes lower, and the remainder which is used in reduction of the principal balance increases. Before long you get to a point where your mortgage has been substantially reduced and you are paying a high amortization on a low loan. There comes a time when this increasing amount of amortization can and often does exceed your depreciation. What does that mean? It means that if there is no change, a participant must pay income tax on money he doesn't receive. In other words, if you pay out one thousand dollars in amortization, and you have depreciation of only eight hundred dollars, you have an increased equity but you must pay tax on the extra two hundred dollars above the eight hundred dollars which was covered by the depreciation. So you must be prepared to recommend to the participants that certain mortgage changes be made from time to time to eliminate the possibility of amortization exceeding depreciation.

I should mention that the partners, who act as agents, have no power to make any such changes. All they can do is recommend to the participants that such a change is wise and should be done and ask their consent to the change. I mention this because it is important that there be no such delegation of authority to agents as to make the situation so similar to a corporation as to create the possibility of subjectivity to corporate tax.

Then there is the necessity to follow the general condition and position of the property and determine when, perhaps, it is wise to recommend a sale of the property. This has happened, although in most instances we have gone into ventures with the expectation that we would not sell properties. But a change in area, a change in business conditions, sometimes makes it wise to change your program. Here also it is only a matter of advice.

I might say that in our agreements we provide that we require the consent of 100 per cent of the participants in order to make

any change of this sort in the mortgage or to authorize a sale. We do protect ourselves by providing that if 80 per cent of the participants do agree to a recommended change, the interests of the remaining 20 per cent, or the participants who have not consented, can be purchased at the book value of their interests. With depreciation exceeding amortization, we have found that where that situation developed, nobody wanted to sell his interest at his book value, and we succeeded, where necessary, in getting 100 per cent of the consents.

Finally, as attorneys, we have helped on the transfers of participations on the death of some of the participants, and we have been helpful in estate tax evaluation. This becomes important to lawyers when somebody dies and he owns an interest and the Estate Tax Department says, "How much is this worth?" Nobody can say exactly how much it is worth because there is no regular market in these interests. Usually they communicate with us and we tell them the truth—which is that, as far as we know, any interest in investments that we have are sold through us, and we have never sold them for more or less than the amount of the original investment. Frankly, this is a planned policy. These are minority interests and it is very difficult to determine their value. We do know they can be sold at the amount of the original investment, and that, I believe, is normally accepted as the estate tax value.

Finally, why are these syndicates of interest and importance to lawyers? First, you may represent a syndicate manager. If you do, there may be a few instruments you may have to be involved with beyond those at the normal closing. You will have a partnership agreement if you use our forms, and our forms are not secret, they are registered with the S.E.C. You will have joint venture participation agreements and you will have net leases. However, this problem won't apply to many lawyers. But more and more lawyers are finding that syndicate participations are part of the assets in an estate that they represent, and they are confronted with two questions: First about transferring such an interest, and secondly, whether or not they should advise retaining it. I think it is wise for a lawyer to know something about these

investments in real estate syndicates, because they are the advisers of clients who succeed those who are deceased. I can tell you this: We have at the present time at least 20 thousand units of participation spread among perhaps 8 thousand people. I don't think that we get three a year in which the beneficiary of people who die wish to sell the interest they inherit. My own experience has been that apparently either the lawyers recommended that these interests be kept or the beneficiaries decided they want to keep them.

One other thing that is important to lawyers is the fact that where a man has syndicate investments it is very important that he execute a will. As a matter of fact, we have prepared certain clauses which we have distributed to hundreds of lawyers in the City of New York and outside of the State of New York, suggesting that their clients, who are participants, put these provisions in their wills, first because we provide for a designation of successor to insure that the interest of the decedent is not lost, and secondly because we want to avoid the possibility of infants becoming owners of realty, if in some jurisdictions the interests in these syndicated investments are held to be realty. I might mention parenthetically, without going into detail, that because of our partnership form the inherited asset is a part of an interest in a partnership which is personality.

Finally, I think the whole problem is very important to lawyers because to me one of the most essential and important functions of a lawyer is to advise his clients in the planning of an estate and in the planning of his life. I can say this: People who go into syndicate investments should not do it with money that they need for their business or living expenses. These investments, in my opinion, are sound investments with high return, but there is a possibility that a time may come when liquidity may be difficult. At the present time it is not difficult. Therefore, I strongly recommend that these investments may be made as permanent investments for income. If an emergency arises that requires an investment be disposed of, it can be. There should not be a policy of going into a participation expecting to sell it at a profit, or to trade or deal in such investments.

If you do not create investments and you are advising a client on a proposed syndicate investment, this is what I suggest you should do: Analyze the proposed investment or get an expert who can analyze it for you. This whole field of analysis by disinterested, qualified experts is really to be developed. If you feel the investment is sound, then the next thing you must determine is that the syndicate manager has integrity and experience; has substantial financial resources or backing; and is organized for personal supervision of the investment in the future.

Collective syndicate investments are an increasingly important factor in real estate and many industrial enterprises. The bar should help to see, in my opinion, that this form of investment reaches maturity with proper government supervision and proper safeguards for our clients.

TAX ASPECTS OF REAL ESTATE SYNDICATION

By HARRY JANIN

Let me sketch very briefly the picture confronting the syndicate manager when he views the factors affecting his form of organization.

First he wants a form of organization which will be continuous regardless of death or insanity of any one of its participants. He does not want to deal with widows nor with estates, and certainly not with minors. He wants a form which would permit him to mortgage the property whenever he chooses, to lease the property on the best terms he can obtain, to sell the property when that becomes propitious, and at all times, to obtain title insurance without having a title company tell him they want the consents or waivers of one thousand or more participants.

He also would like to have a reasonable limitation of liability, at least with respect to the many participants who will have very little to do with the active management of the property. Finally, he may desire a measure of transferability.

Mr. Wien has told you that he views a syndicate participation as a permanent investment. He believes it should be money

which is saved and is not needed for ordinary living purposes. Nevertheless, it is well to set up a measure of transferability as an inducement to participants to enter into particular syndicates, because no matter how permanent an investment may be considered at the time it is made, the occasion may arise when it becomes necessary to realize upon it.

What form of organization best meets these considerations? The answer is very simple. A corporation. But unfortunately, a corporation incurs a corporate tax, and a corporate tax makes the syndicate impossible. It is extremely difficult to find property which will leave a 10 or 12 per cent return to investors after a corporate tax.

I know that there are various devices which may be used to attempt to reduce the corporate tax, but the problem is the uncertainty of their success. One of the most important things, to my mind, in the syndication, is to get the return to the participant without the imposition of a tax before the money can be distributed.

When I speak of "corporate tax," I should point out that the Federal Income Tax Law imposes a corporate tax not only on corporations, but also upon associations. An unincorporated entity is, in certain circumstances, subject to the corporate tax. We must find a form of unincorporated organization which is not subject to tax at the time it receives the income, and which can distribute the net income free of tax except in the hands of the participants.

The desired result is to set up an unincorporated organization which will not be deemed an association for tax purposes. What types or forms may be used? You have heard a limited partnership mentioned. It may also be a tenancy in common. There are tax cases involving the use of trusts, and the combinations of these items is almost infinite. I have seen partnerships and ventures combined with trusts; I have seen ventures combined with partnerships—Mr. Wien told you about that. Almost every type of combination has been tried in an attempt to achieve the result which interests the syndicate manager.

By what means are we to determine whether an unincorporated

entity is taxable as an association and must pay a corporate tax? What form would be non-taxable so that its income goes tax free until it reaches the participant? More than 23 years ago the United States Supreme Court reviewed a case involving an express trust to determine whether the particular trust, an unincorporated entity, was an association taxable as a corporation. In the course of its opinion, the Supreme Court made it quite clear that the test to be used in making the determination is one of resemblance. To what extent does the entity resemble a corporate organization? It pointed to a number of factors which are considered important in determining this resemblance.

For example, it stated that under the corporate form, the ownership of the property was in the entity itself, i.e., the corporation owned the property. If you have an organization that has the same type of ownership, you have one indicia of a corporation. It added that in corporate form, there was centralization of management in representatives of the members or participants. It pointed out that in the corporate form there was control of management, through the control exercised by shareholders over the board of directors. It noted that a corporation's continuity was not affected by death or insanity of a shareholder. It emphasized that under corporate form a shareholder had limited personal liability—he was not responsible for corporate debts; and finally it concluded that a corporation usually conducted a trade or business.

Applying these tests to the particular trust involved, (it happened to be a trust in California which was selling real estate), the court determined that the trust was conducting an active business, that the ownership of the beneficial interest was evidenced by transferable certificates, etc., and concluded that the trust was an association and subject to the corporate tax.

In applying these criteria, which element is important? First, form is unimportant. The mere fact that the particular entity does not have by-laws or a corporate seal or corporate minutes or officers or directors, or transferable certificates, is not significant. They are merely the forms in determining whether a corporate organization exists, and they are quickly dismissed.

State law is of some importance. The taxpayer is aided if it can point to a state law such as The Uniform Partnership Act in New York, which authorizes its existence. But woe betide the taxpayer which asserts it is a partnership and has provisions in its agreement which are in derogation of the state law. In such cases, the variation will undoubtedly be held against it.

What is important is the actual operation of the enterprise and its purpose. In determining purpose, the court will look to the written instrument. The court will assume that the organization has the right to carry out the purposes specified in the instrument, never less, and if the instrument permits or has the characteristics of a corporation, it will do no good to argue that it never intended to exercise these powers. The court will assume that it intended to do so.

Many indirect methods have been tried to obtain the necessary control or the necessary advantages of a corporate form without, at the same time, subjecting the entity to a corporate tax. For example, I have seen centralization of management achieved by giving a long-term contract to a managing agent, the stock of which was owned or controlled by the syndicate manager. In other cases it has been achieved by subleasing the property, the sublessee paying nearly all of the income to the syndicate. In one type of syndication the lease gives the lessee an express power to sell the property.

How do we achieve limitation of liability? Ordinarily you will find an exoneration clause in the mortgage. The mortgagee will not look beyond the property. In leasehold situations the lessor may agree not to impose any liability on a lessee beyond actual occupancy of the property.

How do we achieve continuity? One example was given by Mr. Wien of his joint venture. Another means is by a limited partnership wherein limited partners may transfer their interests, and if a limited partner dies, his death will not affect the continuity of the organization.

Bear in mind that the case which came before the United States Supreme Court involved a trust. The Court emphasized indicia of corporate organization which distinguished a trust

from a corporation. For example, the court said a trust ordinarily does not conduct a business. This trust did. Therefore it had one of the indicia of corporate organization. It would seem to me that the particular indicia would not apply to a partnership because it is quite as common for a general partnership to conduct an active business as it is for a corporation. In applying these tests we must be sure to consider them in the light of the particular organization or entity adopted.

In discussing continuity, the court said that in the corporate form the continuity is uninterrupted by death or insanity of a shareholder. In the trust form of organization the beneficiary may die without necessarily affecting the continuity of the trust. Ordinarily the death of a general partner would affect the continuity of a general partnership but, as I have indicated, the death of a limited partner need not affect the continuity of a limited partnership.

One of the important problems is centralization of management. As a business matter it is usually desirable and necessary that management be centralized in the individual who is most familiar with the property and is responsible to the investors. Centralization of management, in and of itself, is not a factor which should hurt the organization, but centralization of management in a representative capacity resembles corporate form. The directors of a corporation act in a representative capacity; a member of a general partnership does not.

This is also true of a general partner in a limited partnership. But suppose the general partners of a limited partnership in whom management is centralized have contributed only a nominal amount of capital and, by agreement of one kind or another, limited their liability? They may indirectly be achieving the type of insulation which a corporation gives to its shareholders and this may be an important consideration affecting the status of the entity.

In conclusion, let me dwell for one moment on limited partnerships. It happens to be my preference. This does not necessarily mean that some other form of organization is bad or will be subjected to tax. The reason I like limited partnerships is

because there has been at least one Board of Tax Appeals decision approving a New York limited partnership, and the Commissioner has acquiesced in that decision. The acquiescence means that officials of the Internal Revenue Service are required to follow the principles approved in that case in any other which comes before them. Accordingly, I believe a limited partnership stands the best chance of success from a tax point of view.

REAL ESTATE SYNDICATION: SOME BASIC CONSIDERATIONS

By LOUIS GREENBLATT

The title of our forum this evening—"The Why's and How's of Syndication"—like most titles, suggests more than can be covered in one evening's discussion. All of us who address you suffer from the pressure of having to capsule our experience into the short time allotted to each. Consequently what I wish to do is give the basic assumptions underlying syndications which my firm has initiated—our axioms and postulates, if I may borrow from the nomenclature of geometers. On a prior occasion I had the opportunity to give my views more elaborately. And for those who wish to read them, I refer to my published paper on "Multiple Ownership of Real Estate" read at the 1957 Annual Symposium of The Home Title Guaranty Company of New York.

Syndication is not lacking in variety. I suppose that there are about as many kinds of syndications as there are syndicators, and each in time has developed his own approach to syndication. Some, for example, proceed *ad hoc* and pattern their plan for each particular parcel. Others, however, have developed a more or less general method for handling all transactions. Mr. Wien described the method he uses. This has proven successful for him. His investors have a fixed return as long as the earnings are sufficient to pay the amount predetermined to carry the venture.

Our underlying philosophy is that the investors should benefit from any increase in income because they are the ones who would suffer the loss from any decrease in income. Consequently in our syndications, we have always submitted the transaction at actual cost, without the addition of any profit margin for the initiators of the venture. This has been the policy whether the transaction has been the acquisition of an improved parcel of real estate or the more ambitious program of constructing a new building. Actual cost means all costs attending the transaction and would include, of course, a reasonable counsel fee to our firm for its legal services in guiding the transaction to its conclusion.

The form of enterprise we employ is a partnership. And the partnership which is formed to acquire the equity also becomes the operator of the property. There is no division between ownership and operation, with a concomitant leasehold carved out of the fee to handle the operational functions. We do not feel that there is any real difference in tax consequences between a partnership which owns and operates the property, and one which acts only as a passive owner with the function of operation taken over by another enterprise as lessee. Moreover, uniting ownership and operation gives a far simpler pattern than by dividing these functions. Syndication is complicated enough, and any pattern which introduces an element of simplicity should, of course, be preferred, all other things being equal.

The partnership we usually use is a limited partnership—a form of enterprise which has received statutory sanction in New York and many other jurisdictions. The general partners are selected because of their particular skills and knowledge or because of the substantial nature of their investment. But the general partners, as such, receive no compensation for their services. The general partners may not substitute others in their place, but limited partners may transfer their interest with the consent of the general partners. This consent is rarely refused.

We, as syndicate managers, receive an "override" on the earnings from the operation of the property. This, of course, differs in each transaction. On existing equities, we have shared in all

distributions over a predetermined amount allocated to the investors. This predetermined amount varies between 10% and 12% and is cumulative. In construction ventures we have participated in all earnings, but only after the investors first receive a cash distribution of ten percent on invested capital cumulatively from the date of completion of construction.

A fundamental principle that we have adhered to is that the "override" of the syndicate managers must be contingent upon success of the venture. Thus the syndicate managers' reward is not a guaranteed emolument, but depends wholly on the good fortune of the venture.

We act as the owners' representatives in all matters pertaining to the operation of the property, and we, of course, handle all legal matters. The usual practice is to engage a competent real estate management firm to handle operational details. This firm, in the customary way, receives for its services, the fees prescribed by the local real estate board.

We supervise all matters pertaining to the receipt and disbursement of funds of the partnership and the maintenance and upkeep of the properties. We also supervise the mortgaging and refinancing of mortgages, the insuring of the property and all other matters dealing with the preservation of the investment. Our supervision moreover entails the distribution of the earnings to the partners—usually monthly—and the examination and filing of tax returns.

How do we put a deal together? In the first place we only consider prime properties. We cannot afford to become interested in those which are speculative. Every factor bearing on the valuation of the property and its potential is carefully considered—location—condition of the property—its possibilities—competition and many other factors. Of course, the financial structure of the property is of prime importance. And in considering this, it is necessary to determine whether the mortgage indebtedness will become due when refinancing will be available or when earnings will be sufficient to pay the indebtedness.

The proposed deal is then discussed and analyzed with experts

including those professionally skilled as architects and engineers. If a red light, so to speak, appears anywhere along the line the deal is rejected.

When a deal is finally approved we ourselves go forward with it. We, ourselves, sign the purchase contract and make the necessary deposit with our own funds. Thus we assume all of the immediate risks. We then arrange a closing date sufficiently in advance to enable us to complete the syndication.

Who are our investors? These are a very limited group of people who stand close to us—clients, friends, relatives, and the like. A summary of the transaction is prepared for them. This summary contains a complete disclosure of all of the pertinent information about the transaction.

We have never solicited anyone to become an investor, nor have we ever paid a commission to anyone to solicit or invite anyone to come into our deals. We have never advertised to the public or solicited investors through brokers.

Many of you, I am sure, if not initiators of a syndicate transaction, may nevertheless be asked by a client about possible investment in such an enterprise. What should the client be alerted to? There are three considerations which I believe are of the utmost importance to a client seeking such advice.

The first thing to be considered by the prospective investor is: Who is the proposer of the transaction? Who is behind it? What is his reputation, knowledge and skill? This point was stressed by Mr. Helmsley, who you heard speak earlier, and I am in complete agreement with him in the emphasis he gives to this matter. Those who are thinking about investment in syndications, should carefully study the prior record and dealings of the initiator of the transaction. Does his experience show him to have the continuing interest of the investor at heart? Does he have a financial stake in the venture? Is he one who stays with a venture and who will not leave it by disposing of his interest?

Next the deal itself should be studied and analyzed both as to its present and future potential. Is it a good venture or is it something someone is trying to unload?

Finally the prospective investor should make certain that there

is a full disclosure of all the facts bearing on the transaction. The information furnished by the initiator of the transaction should be forthright, clear and complete. If estimates of income and expenses are submitted they should be all inclusive and based on actual experience with the kind of properties involved. If a profit is being made by the initiator, it should not be vaguely described. The actual amount should be stated. If a brokerage commission or other payment is given to solicitors for procuring the individual investors, the amount so paid or interest given should be stated. I cannot emphasize too strongly the *sine qua nom* of absolute candor. Nothing less than full disclosure with the broadest meaning given to the word "full" will suffice.

Full and complete disclosure is also most important from the viewpoint of the initiator of the venture. By making such a disclosure there can never be any justifiable complaint if the property fails to live up to expectations or if economic conditions should change.

New forms of business activity act as a sort of catalyst in generating departures from conventional transactions. It is not surprising, therefore, to see new patterns created as a consequence of syndication activity. Thus with the adoption of the 1954 Amendment to the Internal Revenue Code we felt that new construction projects offered an excellent tax shelter and an opportunity for a higher net return for investors, particularly for those in higher tax brackets and not in need of immediate income.

These ventures involved, of course, the risks of construction, as well as the chore of obtaining new tenants, not to speak of the problem of estimating ultimate costs. But these ventures enabled the investors to create their own project from the ground up. Four large apartment houses were erected in prime East Side locations in Manhattan. The investors, of course, had to wait for income until the buildings were erected and rented, just as all builders must do. However, when the projects were completed, their success justified the calculated risks which were undertaken. The earnings received, the tax benefits and the equity created

far exceeded the return which could have been obtained from a conventional investment in an existing equity.

We have had some experiences in syndications which I believe would be of particular interest to members of the bar. Time does not allow me to describe all of them. One, however, is of singular interest and I should like to touch upon it briefly.

Consider a client who has owned a property for some time and who would like to realize some cash from his equity, tax free, and still retain an interest in the property, or the client might wish to provide funds for a major alteration or improvement. I assume that it would be undesirable to create a second mortgage or other lien.

Such a situation confronted a small group who, as partners, owned a 99-year lease on an entire square block. A large apartment house had been erected on one block front, and shortly thereafter a second large apartment house had been erected on the second block front. It was then decided to erect a third large apartment house on the center plot.

A considerable investment had been made in both blockfronts and a large sum of money was needed to complete the third building. It was decided to syndicate the entire project. This was accomplished as follows:

a) The existing buildings were taken at a fair appraised value. The new building to be erected was taken at its projected cost (the total cost of construction of the new building was guaranteed by the original owners) and the value of the total equity was then determined;

b) Additional partners were added to the existing partnership. The new partners were admitted by paying 50% of the total value of the existing two buildings plus the cost of the new building. After setting aside the funds required to complete the third building, the remaining cash was distributed to the original owners as a return, in part, of their original capital investment;

c) The original owners agreed that out of the income from the existing buildings there should be first paid to

the additional partners a sum equal to 11% cash distribution on the new capital furnished. The excess was then to be paid to the original owners until they received an equal distribution, but this was to be on a non-cumulative basis. Thereafter all partners participated equally in all distributions in proportion to their interests in the partnership.

Handling this transaction was truly a unique experience. It involved many novel legal and tax problems, as well as novel accounting procedure and details not found in more conventional syndications.

When an attorney offers a parcel for syndication, it affords him the opportunity of pooling the resources of a number of his clients and friends who alone do not have the capital to handle the transaction.

The syndication of real property investment involves the assumption of great responsibility by the initiator of the transaction. Syndication should not be undertaken except by those qualified to do so, and only after careful and expert study. In sum, syndication does not have its analogue in the roulette wheel. Reward, both for investor and syndicate manager, will come only with the diligent application to an analysis of the transaction in its myriad of details. Syndication is no exception to the aphorism that nothing that is worthwhile comes easy.

SYNDICATION AND REGULATION

By MILTON P. KROLL

It is, of course, essential that the syndicator and the practitioner who advises him be familiar with the requirements of the federal and state securities laws; and that they consider carefully whether those laws apply to the offering of interests in the syndicate investment. Failure to observe these requirements, where they are applicable, can result in a good deal of grief. The government, in the case of a suspected violation, may start an investiga-

tion and subpoena witnesses and documents. It may go to the courts for injunctive relief or, in the case of seriously wilful violations, may seek criminal indictment. In this connection, it should be noted that the criminal penalties provided for in the federal securities law definitely are in the felony class. In addition to the governmental sanctions provided for where these laws are violated, the investor is also given certain "self-help" rights. Many of the securities laws provide that where a security is sold in violation, the transaction is voidable at the option of the purchaser. Thus, for example, under the federal Securities Act, if a security is sold without being registered under that act and registration was required, the purchaser has a full year within which to rescind the transaction. Similar rescission rights are provided for in the state laws. In view of these possible consequences, it is plain that the real estate syndicator must concern himself with these laws.

On the federal level, securities regulation is governed primarily by the Securities Act of 1933—and I shall speak chiefly about the requirements of that law. However, when the Securities Act was passed, Congress took pains to specifically preserve the right of the individual states to also regulate securities transactions within their borders. Thus, this is an area in which there is dual regulation and both sets of laws must be kept in mind.

Unfortunately, the state laws are quite complex. Forty-seven of the states have securities laws of one kind or another and no two of them are identical. Obviously, these so-called "blue sky" laws could provide the material for several panel discussions of this type, and I shall do no more than advert to them briefly at the close of my discussion.

Let us consider the requirements of the Securities Act of 1933. As most of you know, this law, in general, requires that before a security can be offered or sold by any use of the mails, or by any interstate means, it must be registered with the SEC in Washington. Every offeree or purchaser of a registered security must be furnished an official prospectus which is designed to set forth all of the pertinent information necessary in order that the investor may exercise an informed judgment as to whether or not he

wishes to make the investment. The registration statement including the prospectus is examined and processed by the SEC.

The Act contains a number of specific exemptions from this registration requirement and certain of them are of particular interest to the real estate syndicator. We shall discuss them in a moment.

First, however, we should consider whether the interests offered in connection with real estate syndications constitute "securities" within the meaning of this law. Unless they do, the law has no application at all. Certainly, the usual syndicate interest—whether it be an interest in a limited partnership or in a joint venture—does not fall within the common concept of a "security." Usually, one thinks of stocks, bonds or debentures when asked to define a "security." However, the definition of that term contained in the Securities Act goes far beyond this common concept.

After defining the term to include the commonly known documents, the definition goes on to include certain catch-all phrases such as "investment contract" or "certificate of interest or participation in any profit sharing agreement."

The courts and the administrative agencies have put a substantial gloss on these catch-all phrases. They have come to include any arrangement whereby a person invests his money in a common enterprise with the expectation of deriving profits from the efforts of the promoter or some third party.

Because of the profit sharing aspect, transactions which in form involve the sale of oil leases, citrus grove acreage, cemetery lots, leases in co-operative apartments, and even silver foxes and chinchilla, have been held to involve the sale of investment contracts and, therefore, "securities." While the federal courts have not had occasion to consider the typical real estate syndicate, they have held that other types of limited partnerships involve "securities" under the law, and the cases I have referred to are certainly broad enough to cover any other type of real estate syndicate. Although the direct conveyance of title to real property, without more, is clearly outside the scope of the Securities Act, such sales are held to involve investment contracts when there is a profit-sharing aspect or arrangement. The Illinois courts recently

had occasion to consider this very type of situation and held that "securities" were involved in a real estate syndication, notwithstanding that the investors received deeds to undivided fractional interests in the real estate itself.

While there may be room for argument about this concept on a theoretical basis—perhaps an appeal to a forum such as the Harvard Law Review might succeed—I do not think that at this stage of the game anyone could convince the courts that interests in a realty syndication do not constitute "securities."

What then, are the exemptive possibilities? The Act contains a number of specific exemptions from the registration requirements. Only three of these exemptions have any application to real estate syndications.

The two most important are the exemption for intrastate offerings found in Section 3 (a) (11), and the exemption for transactions not involving any public offering, provided for in Section 4 (1).

The 3 (a) (11) exemption is designed to cover purely local enterprises. It applies only where the entire issue is offered and sold exclusively to residents of the state in which the issuer is organized and does business.

Note the limitations of this exemption: (1) The entire issue must be offered and sold only to residents. Even a single offer or sale to one who in fact is a non-resident destroys the exemption for the whole issue—even as regards the sales made to residents. What is more, the issuer must be assured that such resident purchasers are not buying with a view to subsequent resale to non-residents. As the SEC puts it, "The securities must be in the hands of residents at the time of completion of the distribution." (2) The underlying partnership must be organized and doing business in that same state. In cases where the property is located in another state, the SEC takes the position that the exemption is not applicable. This, notwithstanding that the property is operated by a third person under a net lease and the partnership does no more than collect rent. In other words, you cannot claim this exemption for the sale of syndicate interests in New York where the property is located in New Jersey or Pennsylvania. As

can be seen this is a rather dangerous exemption to rely upon, and the burden of proving that any exemption is available is upon the claimant. It is especially risky where the amount of the syndication is large and solicitors are employed, and particularly so in the case of New York City where so many persons who would be the natural objects of solicitation actually reside in Connecticut or New Jersey, although they conduct their business in New York.

The other exemption I have mentioned is the Section 4 (1) exemption for "transactions not involving any public offering." The Act does not define this concept of public offering. It is far easier to say what is a public offering, than to say what is not one, and the latter is the important question.

The determination must be made on a balance of several factors. As early as 1935, the SEC stated that the following are the significant ones:

1. Number of offerees:—To how many persons is the offering addressed? The important thing here is the number to whom the offer is made, as distinguished from the number who actually purchase.

2. The type of offeree:—Are they sophisticated persons who can fend for themselves? Do they have access to the sort of information that would be provided in a registration statement? Have they participated in previous deals? Are they relatives or clients? All these factors are important.

3. The number of units and their denomination:—Obviously, where a large number of small units is offered, the arrangement is more likely to be public than where a small number of large units is offered.

4. Manner of offering:—Is the offer to be made on a personal basis, or is it to be advertised or sold through solicitors?

All of these things must be considered. Generally, the SEC, as an administrative matter, has not questioned private offering claims where the number of offerees is limited to 25 or fewer persons, all of whom take the security for investment rather than for resale. If more than 25 offerees are involved the other factors I have noted must be considered. No numerical guides can be

provided. However, you have an uphill fight whenever a larger number than 25 offerees is involved.

In 1953 the United States Supreme Court considered the private offering exemption in the Ralston Purina case. That case involved an offering of company stock to several hundred employees of the company. The Court held the private offering exemption did not apply. It stated that, while there is no quantity limit under the exemption, it applies only where there appears to be no practical need for applying the protection intended by the Act. In other words, an offering to those who are well informed about all aspects of the transactions—who have access to the sort of information that would be provided by a registration statement—is private.

After this case, I doubt that the SEC will go much above the 25 person limit, unless it can be shown that the offerees are in a position to fend for themselves. The question must be determined on a case by case basis and only after very careful thought has been given to all of the aspects we have been discussing.

Where the syndication does not involve more than $300,000, the SEC's Regulation A should also be considered. This is an exemption from registration provided in cases where the aggregate offering in any twelve month period does not exceed $300,000. To obtain this exemption, the issuer must file certain information with the applicable Regional Office of the SEC and must provide investors with an offering circular which is rather less detailed than the prospectus required in the case of a registered offering. While this procedure is less complex, less time-consuming, and less costly than registration, it is available only to small syndication offerings.

If no exemption is available and the interests must be registered, just what is entailed? Many of you have been through the process. Before the interests can be offered, a registration statement must be filed with the SEC in Washington. The SEC is very sensitive to pre-filing publicity about an offering—as witness the recent injunctive action here in New York, against Arvida Corporation—and it should be avoided. No sales can be made until the registration statement is declared effective by the SEC.

During the interim between filing and effectiveness, oral offers can be made and written offers also can be made in a limited way, primarily by means of a so-called "red herring" or preliminary prospectus. But no binding commitments can be made until the registration is effective and the purchaser is provided with a statutory prospectus.

Registration consists of filing with the SEC a registration statement which includes the prospectus that is to be furnished to investors. The prospectus is meant to include all of the information that an investor needs to exercise an independent and informed judgment. The SEC has forms which list the items of information required. Since there is no special form for real estate syndicates, it has been necessary to improvise to some extent. Over the past six or seven years, a fairly workable format has been developed by those who have filed such statements.

The registration statement must include financial statements, including a certified balance sheet for the partnership and five-year operating statements for the property (three years of which must be certified to by an independent accountant). Pertinent documents must be filed as exhibits, and the entire statement is open to public inspection at the SEC offices.

Upon the filing, the statement is assigned to a staff group at the SEC, which includes security analysts, attorneys, and accountants. After about two weeks, you will receive a letter of comment which sets forth the changes that the staff thinks must be made in the materials.

The items most generally stressed in a realty syndication registration relate to whether the earnings history of the property supports the stated yearly cash distributions that the syndicators propose to pay. Another essential relates to the profits that the organizers of the syndicate will obtain from the transactions. Then, there are matters such as the physical condition of the property, facts about occupancy and competition, rights and possible obligations of participants, and as to the terms of any net lease of the premises. Finally, the SEC requires a breakdown showing the proportion of the proposed cash distribution that will represent a return of capital, as distinguished from the part

that will constitute income to the investor. Of course, the facts peculiar to a given syndication may result in emphasis being placed on other disclosures.

When the registrant has complied with the SEC comments through the filing of an amendment, request is made for an effective date. Upon effectiveness, you are free to consummate sales, provided, of course, that the official prospectus is furnished to each purchaser.

I know that those of you that have not been through the registration process will ask how long this procedure takes. That is a variable which depends on a number of things. How carefully was the statement prepared? How busy is the staff group at the SEC to which the case is assigned? Time of year is important too. Is it a holiday season? Is it during the so-called proxy season, February to April, when the SEC has very many corporate proxy statements to examine, each with a close deadline date. You cannot expect to complete the registration process in very much less than 20 days, and it probably will take longer. How much longer will depend on the factors I have mentioned.

Once the registration is effective, the registrant is subject to certain further filing obligations where the offering involved $2,000,000 or more. Annual reports must be filed with the SEC, including financial data, and, in certain cases, current reports must be filed. All of this material is open to public inspection.

Now just a few brief words about the state blue sky laws. These are of three main types:

(a) Pure anti-fraud laws. A typical law of this type is found in New Jersey. Such laws impose no affirmative requirement on the syndicator.

(b) Registration of brokers or dealers. The law in Pennsylvania falls in this category. If you employ solicitors, they may be required to register. In some states, the syndicate itself (or the syndicate principals) would be required to register as a dealer before it could offer interests in that jurisdiction.

(c) Qualification laws. These are generally found in the Midwestern, West Coast and Southern states. As contrasted to the federal law, which is purely a disclosure law, state laws of this

type permit the securities commission to pass on the merits of the issue on the basis of what often are rather vague standards.

New York's law, the Martin Act, is basically an anti-fraud law, which gives investigative and injunctive powers to the Attorney General. Also, dealers are required to make certain filings before they can sell securities in New York, and a syndicate which sells direct to the public is considered a dealer for this purpose. Naturally, there are a great many in the audience who are more familiar with the New York requirements than I am.

Any discussion such as this suffers from the danger of oversimplification, but time does not permit a fuller or more technical discussion. Perhaps we can fill in the blanks during the question period.

Background Materials for Statutory Interpretation in New York

By A. FAIRFIELD DANA

It's not too great an exaggeration to say that, compared to Federal legislation, available background materials on the intended meaning and proper interpretation of a New York statute are virtually zero.

I say this because the two main sources in Washington—the report of debates printed in the *Congressional Record,* and the formal reports of Senate or House committees to which a bill has been referred—are for all practical purposes not available, in their counterparts, in Albany. Debates on bills in the New York Legislature are *not* published and made available to the public, and reports of the standing committees on bills referred to them are practically non-existent.[1]

So, when you look at almost any one of the New York enactments, lying there in its appropriate volume of McKinney's or in the Civil Practice Act, you initially draw a blank, so far as being able to know anything about its source, meaning intended by the sponsor, etc. In most instances you'll have to work very hard to obtain *any* background on the enactment. That leads me to tell the somewhat irrelevant story of the two men, strangers

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Editor's Note: Mr. Dana recently gave this talk at the New York University School of Law, under the joint aegis of the Law School and the New York Legislative Service, Inc., Professor Shelden D. Elliott presiding. Mr. Dana, a former Chairman of the Association's Committee on State Legislation, and a Director of the New York Legislative Service, has for the past six years been the Editor of the NEW YORK STATE LEGISLATIVE ANNUAL.

[1] For good descriptions of (a) the extent to which stenographic notes are made of debates in the Legislature, and the limited extent to which such notes are transcribed and to whom they are made available, and of the un-illuminating material (mostly, roll-calls on bills and other procedural items) which *does* appear in the official Journals of the Senate and the Assembly, and of (b) the lack of written reports by the standing committees, see article by Ernest Henry Breuer, Law Librarian of the New York State Library, entitled *Legislative Intent and Extrinsic Aids to Statutory Interpretation in New York,* 51 LAW LIBRARY JOURNAL 2 (1958), and Professor Walter Gellhorn's *Foreword* to the 1946 NEW YORK STATE LEGISLATIVE ANNUAL.

to each other, who met in a U. S. city foreign to them both, and each of whom was anxious to make known to the other something of his background, worth, etc. Neither knew quite how to go about it. But finally the first one reached into his pocket, drew out something and held it out in the palm of his hand, and said impressively "Phi Beta Kappa key—Harvard—1933." The other man thought awhile, then reached into his pocket, brought out something and similarly held it out, and said "Ignition key—Cadillac—1958." In that contest of backgrounds I suppose it's quite clear which of the two men came out ahead.

Now, having plunged you into the depths of despair (assuming you *care* deeply about all of this) by telling you that the New York background sources or materials are virtually zero, let me cheer you up, to a limited extent, by telling you of what materials there are. Many or most of these I am sure you know of, already.

In addition to listing for you, in the first part of my talk, what those materials are, and where they can be found and examined, at the end of the talk I want to set forth some discussion of the extent to which a New York court would *pay attention* to those sources. For I know you are not entirely abstract scholars, interested solely in learning all you can about the background of a New York statute, what the drafter really intended, etc., etc. As lawyers you will also be interested in knowing to what extent a court will be influenced by the background materials which you have uncovered.

First, the principal background materials, and where they can be found:

SOURCES OF BACKGROUND MATERIALS

Law Revision Commission

If the enactment you are inquiring about was sponsored by the New York State Law Revision Commission, you are fortunate indeed. For the Law Revision Commission, which has had the statutory duty since its creation in 1934[2] of drafting and recom-

[2] The Commission was created by chapter 597 of Laws of 1934, which enacted Article 4-A of the Legislative Law.

mending needed new laws, always submits to the Legislature, in addition to the text of the bill itself, the Commission's "Recommendation," usually 4 or 5 pages in length, which Recommendation first sets forth the existing state of the law, then states the defects therein or difficulties therewith, and then explains exactly what changes are intended by the proposed new statutory language. It would be hard to imagine a clearer statement of bill-drafter's intent. But, just in case you are left in any doubt at all by the Recommendation, the Commission also makes available the much longer and underlying "Study" pertaining to the bill, which Study has been prepared, under the Commissioner's direction, by the Commission's research staff or by expert research consultants. A Study will usually run to 30 or 40 printed pages, or even longer, and will give you all the detail you can possibly want.

How can you tell if the enactment you are looking at was originally proposed by the Law Revision Commission? The answer here is that the volume of McKinney's or the annotated edition of the Civil Practice Act which contains the enactment will (a) *state* that the enactment was recommended by the Law Revision Commission, will (b) give a reference to the official Legislative Document where the texts of the Recommendation and the Study can be found, and will also (c) give a very condensed one or two sentence statement of the purpose of the bill.

The helpful information just mentioned will appear in McKinney's or the annotated Civil Practice Act because the editors of such volumes "lift" such information verbatim from a "Note" which is printed right at the end of the bill itself (and which statutory note thus forever becomes a sort of built-in part of the legislative history of that enactment).[3] Here is how a typical Law Revision Commission "Note" appended to a bill will read:

> "(NOTE: This is an amendment recommended by the Law Revision Commission. See Leg. Doc. (1953) No. 65 (K). Its purpose is to authorize the Supreme Court to provide for the maintenance of a wife

[3] On a few rare occasions, however, McKinney's or the annotated Civil Practice Act may fail to note that the enactment is a Law Revision Commission bill (see, for example, chapter 118 of Laws of 1958, amending Personal Property Law §33).

where the husband has previously obtained a divorce, annulment or a declaration of nullity of a void marriage from a court which did not have jurisdiction over her person.)"

Thus the Law Revision Commission gives you *three* items of background material: the short one-paragraph Note, the 4 or 5 page Recommendation, and the 30 or 40 page Study. As just stated, the Note is right in plain sight, and directs you to the particular Legislative Document where the Recommendation and Study are printed in full. Also, each annual Report of the Law Revision Commission, a bound volume containing all Recommendations and Studies issued that year, is available in virtually all law libraries.

The Judicial Council

You will be equally fortunate if the enactment you are interested in was one proposed by the Judicial Council of the State of New York. That entity was also established by the Legislature, and also in 1934,[4] and also had the duty of proposing new New York laws. Since the Council was concerned with the organization, jurisdiction and administration of the courts and with problems of practice, procedure and evidence, the laws sponsored by it have been primarily in the field of adjective law. Thus most of the laws sponsored by it have been amendments to the Civil Practice Act, although the Council has also sponsored extensive revisions of the Judiciary Law and other laws.

The Judicial Council submitted to the Legislature, with each of its bills, a detailed Recommendation explaining the present state of the law, describing the need for change, and setting forth the intent of the proposed new statutory language. With most although not all of its bills, the Council also submitted a Supporting Study; such Supporting Study gives all the additional background you could wish.

Similar to the Law Revision Commission statutes, you will know whether a Civil Practice Act amendment, say, was drafted

[4] The Judicial Council was created by chapter 128 of Laws of 1934, which enacted Article 2-A of the Judiciary Law.

by the Judicial Council, because an editor's note in the Civil Practice Act manual will *say* so—such editor having seen and copied the statutory "Note" to this effect appended at the end of the bill itself.[5]

The texts of the Judicial Council's Recommendation and Supporting Study as to a particular bill are readily available—they are printed in the bound Annual Report of the Judicial Council for the year in which the bill was enacted, and they have also been printed as an official Legislative Document each year. (The Legislative Documents, for each year, are available in bound volumes in almost all libraries; their official title is "New York Legislative Documents.")

The Judicial Conference

I have been speaking of the Judicial Council in the past tense for, as you know, the Judicial Council was ended by the same 1955 statute[6] which established the Judicial Conference. The Judicial Conference, created upon the recommendation of the Temporary Commission on the Courts, has far greater powers and duties, as far as administration of the courts is concerned, than the Judicial Council had, but the Judicial Council's power and duty of recommending new laws to the Legislature has been expressly continued in the Conference. And the Conference *has* continued the Council's practice of preparing and proposing new laws, and also the practice of issuing a very helpful and detailed memorandum (a sort of combined Recommendation and Study) in connection with each one; for example, the memorandum explaining and supporting the 1957 amendment (chapter 877) relating to *lis pendens* is 20 printed pages in length.

The supporting memoranda of the Judicial Conference are readily available—the Conference each year publishes a bound Annual Volume which contains the memoranda, and the mem-

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[5] Unfortunately, not all of the Judicial Council's bills have had the usual Note appended to the bill, and as a consequence the Civil Practice Act manuals do not identify the origin of these few un-Noted bills; see, for example, chapter 346 of Laws of 1954, amending C.P.A. §588.

[6] Chapter 869 of Laws of 1955, which enacted Article 7-A of the Judiciary Law.

oranda are also contained in a Legislative Document each year. And to most of the Judicial Conference bills the following "Note" is appended: "This bill is recommended by the Judicial Conference" (and sometimes adding one or two sentences about the purpose of the bill), and that Note is usually picked up and repeated in the annotated editions of the Civil Practice Act or in the appropriate volume of McKinney's. Thus, usually, you are instantly alerted to the fact that it is a Judicial Conference bill and that you can readily find a full memorandum on the background and purpose of the bill.[7]

I want to digress here for a moment from my list of background materials, to tell you that to date I've given you only the most cheerful side of things, and that from now on in this list things are a good deal more difficult. That's because, out of the 900 to 1,000 bills which have become law in each of the recent years in New York, only a total of 20 or so bills per year have been sponsored by the Law Revision Commission or the Judicial Council (or Judicial Conference). Thus the happy situation I have been describing, of being led readily to very detailed memoranda giving the origin and purpose of the bill, does not exist except for just a handful of the bills enacted each year.[8] With all the rest of the enactments, over 900 or more, there is still a triple-barreled problem to solve, namely, (1) what entity prepared or sponsored the bill, (2) did that entity, or other entities as well, prepare a memorandum or report explaining the purpose of the bill, and (3) where can the text of such memorandum, if the memorandum exists at all, be found. Before attempting to aid you on that problem, it will be helpful if I first list a few more important sources of background materials.

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[7] But sometimes there is no "Note" at all appended to a Judicial Conference bill (see, for example, chapter 149 of Laws of 1956, and chapter 906 of Laws of 1956), and then, sadly for the background researcher, there is no reference in the Civil Practice Act manual or in McKinney's to the origin of the bill.

[8] In addition to noting Law Revision Commission and Judicial Council and Judicial Conference bills, McKinney's of course prints helpful background material when the new statute or amendment is part of an *extensive* statutory revision or codification, such as the new Real Property Tax Law enacted in 1958 and to become effective October 1, 1959.

Joint Legislative Committees and Temporary State Commissions

Many of the laws enacted in New York each year are originally prepared and sponsored by a Joint Legislative Committee or a Temporary State Commission (each year, usually more than 100 of the enactments have this origin). That is because most of these official entities have been created with the purpose, in whole or in part, of recommending legislation—sometimes their assigned task is to prepare an entire statutory revision in a particular field. These entities issue a formal report, accompanying their proposed legislation, and the report of course discusses the purpose of the legislation and sometimes also includes or annexes a detailed memorandum on each bill which has been prepared.

The reports of such Committees and Commissions are usually printed as official Legislative Documents. Thus, *if* in later years you can ascertain that an enactment was sponsored by a particular Joint Legislative Committee or Temporary State Commission, you will have no trouble in locating the helpful background material.

I emphasize the "if," however, for only in a small minority of instances will the volume of McKinney's you are looking at inform you that the bill was sponsored by such an entity. For example, in 1958 the Joint Legislative Committee on Health Insurance Plans prepared four bills on that subject which were enacted (chapters 943–946), and the Joint Legislative Committee on Commerce and Economic Development prepared seven installment sales laws which were enacted (chapters 681–687). Yet the volumes of McKinney's which set out the text of these laws do not indicate their source in any way; that is because there was no statutory "Note" attached to the bills themselves to show their source.[9]

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[9] On the other hand, the Joint Legislative Committee on Housing and Multiple Dwellings, which sponsored 30 or more bills enacted in 1958, almost invariably has a "Note" appended to its bills (although without naming the Committee), explaining in helpful fashion the need and purpose of the bill. And McKinney's, in its Multiple Dwelling Law and Multiple Residence Law volumes, prints such Committee's Notes.

Just a little later, I will discuss how you might go about tracking down the source in an instance where the bill itself, and McKinney's, gives no indication of origin.

New York State Departments

Each year, various of the Departments of New York State prepare bills which are introduced at their request, and are enacted. More than 60 of the Laws of 1958 had this origin—the State Banking Department and the Departments of Education, Taxation and Finance, Insurance, Correction, Conservation, and Audit and Control sponsoring from 5 to 15 enactments apiece. Many of these Departments issue memoranda explaining and supporting their bills.

Each of these Departments publishes an annual report, as an official Legislative Document, and in such annual report you can usually find helpful material on the bills that that particular Department prepared. Or you can communicate with the Department and *ask* for their memorandum on a particular bill.

But again, the more important question, which I will reach in a moment, is how can you *find out* if the Banking Department, say, was the sponsor of a particular Banking Law amendment which, 10 years later, you are attempting to interpret properly and trying to find one or more explanatory memoranda on.

Governor's Messages

The Annual Message of the Governor to the Legislature has contained, in all recent years, many references to bills which are to be introduced as part of the Governor's program. Similarly, in recent years the Governor has issued supplemental Special Messages (in 1958, approximately 25) during the course of the legislative session, urging the adoption of particular bills. Finally, when signing a bill, the Governor will often issue a so-called Approval Message (in 1958, more than 90 such messages were issued).

These messages of the Governor, usually describing the need

for and intended purpose of the bill, and often stating the source or origin of the bill as well, become in later years a helpful aid in legislative background and interpretation.

The messages are available as part of the Governor's official papers, but as a practical matter it is easier to obtain and read the messages in the New York State Legislative Annual, or in McKinney's bound volume of Session Laws of New York, for the year in question.

Bar Association Memoranda

Several of the bar associations in New York regularly prepare printed or mimeographed comments on pending legislation and send such comments to Albany. The Committee on State Legislation of the Association of the Bar, for example, has prepared printed reports on pending bills every year since 1914, and those reports are on file in the Association's Library. The Association's Committee on Criminal Courts, Law and Procedure has similarly prepared reports on bills affecting the Penal Law and Code of Criminal Procedure.

I can't advise you that such reports would be accepted by a court as direct evidence of the legislative intent. But, in addition to the helpful analysis or criticism of the proposed statutory language which each report contains, I can advise you that a lot of hard work, telephoning and shoe-leather goes into attempting to find out, and putting into each report where it can be done so, what entity has sponsored the bill and what the sponsor's intent is. For example, if you had no other background material on a 1935 enactment, and then examined the Committee on State Legislation's report on the bill and found it to contain the sentence: "This bill is sponsored by the Associated Railroads of New York, and is designed to correct the alleged inequitable result reached in the recent *Jones* v. *Johnson* decision," you would be well repaid for your research.

On occasion, as well, bar associations themselves propose legislation, and support the proposed enactment with a detailed explanatory memorandum.

New York State Legislative Annual

I want to switch now from listing *entities* which prepare contemporaneous memoranda on bills, and instead describe the first of three valuable *collections* of memoranda and other helpful background materials on bills which are enacted. These collections, as I have called them, will be of particular aid when you do not know what entity originally sponsored the enactment you are interested in.

If the enactment you are interested in has no legislative history annotation pertaining to it, in the appropriate volume of McKinney's or in the Civil Practice Act manual, except the usual bare annotation that the amendment was, say, "added by chapter 943 of Laws of 1958," about all you know then is that the bill was probably not drafted by the Law Revision Commission, Judicial Council, or Judicial Conference. Where do you go from there?

I believe the place then to look is in the New York State Legislative Annual—a book, 600 or so pages in length, which is published yearly (since 1946) by the New York Legislative Service, Inc., a non-profit membership corporation located at 305 Broadway, New York City. What the *Annual* does is to collect and record in permanent form each year all primary source material available on each bill enacted that year; such source material is usually the explanatory contemporaneous memorandum issued by the entity which originally prepared and sponsored the enactment, but is often, or, in addition, contemporaneous memoranda prepared by other entities and commenting on and explaining the bill.

For example, suppose you are interested in chapter 943 of Laws of 1958, mentioned above. If you look in the Chapter Number Index of the 1958 *Annual,* and then turn to the various pages which are listed opposite the heading "Chapter 943," you will find, in turn, the explanatory memorandum of the entity which prepared and sponsored the bill (the Joint Legislative Committee on Health Insurance Plans), then a memorandum of the State Superintendent of Insurance discussing the bill, and then the Governor's Approval Message on the bill.

For a further example, if you look up in the *Annual* another of the enactments which I mentioned above as having no background material given as to it in McKinney's, chapter 681 of Laws of 1958, amending the Personal Property Law with respect to installment sales, you will find the explanatory memorandum of the entity which prepared and sponsored the bill (the Joint Legislative Committee on Commerce and Economic Development), the Governor's Approval Message on the bill, and also references in the Governor's Annual Message and in one of his Special Messages to the need for such an enactment.

The value of the *Annual* is two-fold. First, it collects and prints the memoranda which are issued on bills by what might be called official or *Governmental* entities sponsoring bills—the Law Revision Commission, Judicial Conference, Joint Legislative Committees and Temporary State Commissions, the various State Departments, the Governor, the Attorney General, the City of New York, Port of New York Authority, etc., etc. The *Annual* also prints many of the memoranda prepared by individual legislators; as you probably know, in recent years it has been the usual requirement of the Governor that the Senator or Assemblyman who has introduced a bill which is before the Governor for signature or veto must submit to the Governor a letter or memorandum explaining the purpose of the bill.

Most of these memoranda are printed elsewhere, as well (although not the memoranda prepared by the individual legislators), but in later years they are hard to find, and lawyers and the courts have found it helpful to cite them as printed in the *Annual*.[10]

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[10] See, for example, *Farrington* v. *Pinckney*, 1 N.Y. 2d 74, 88 (1956) (memo of introducing legislator); *In the Matter of Berson*, 283 App. Div. 190, 193 (3d Dep't. 1953) (memo of introducing legislator); *Pub. Serv. Coordinated Transp.* v. *State Tax Comm'n.*, 180 N.Y.S. 2d 418, 421 (3d Dep't. 1958) (memo of State Tax Commission); *In the Matter of Estate of Benson*, 275 App. Div. 226, 230 (4th Dep't. 1949) (memo of Department of Taxation and Finance); *Fonda, J. & G. Ry.* v. *State Tax Comm'n.*, 3 App. Div. 2d 178, 185 (3d Dep't. 1957) (memo of State Tax Commission) (dissenting opinion); *County of Erie* v. *City of Buffalo*, 4 N.Y. 2d 96, 101 (1958) (Governor's memo); *Dunleavy* v. *Walsh, Connelly, Senior & Palmer*, 309 N.Y. 8, 11 (1955) (Governor's memo); *Four Maple Drive Realty Corp.* v. *Abrams*, 2 App. Div. 2d 753, 754 (2d Dep't. 1956) (memo of State Board of Equalization and Assessment).

Second, the *Annual* is the only entity which collects and prints the supporting or explanatory memoranda prepared by various *non-Governmental* entities which propose legislation or which comment helpfully on legislation proposed by others. Each year, usually between 100 and 200 of the bills enacted originate from a private, i.e., non-governmental, source. For example, the *Annual* prints supporting memoranda prepared by the Council of Retail Merchants, New York Stock Exchange, New York Clearing House Association, State Bankers Association, State Savings Banks Association, Credit Union League, State Savings Association League, State Automobile Dealers Association, Greater New York Hospital Association, Life Insurance Association of America, Association of the Bar of the City of New York, etc., etc.[11]

But I would be remiss if I told you that the *Annual* would always solve your problem. For, in most years, with respect to about one-half of the 900 or 1,000 or so enactments, the *Annual* can find no sponsor's or other explanatory memorandum whatever. In many instances, not even a copy of the usual individual legislator's memorandum, described above—the original of which memorandum goes into the so-called Governor's bill jacket (discussed later in this talk)—is available for publication in the *Annual.*

McKinney's Session Laws of New York

In those instances where the *Annual* is of no aid, I believe the next place to look would be in the appropriate bound volume of the Session Laws which McKinney's has issued annually since 1951. For such volume usually prints, at the end of the text of each new law, whatever statutory "Note" was printed at the end of the bill itself. And such a "Note," if one exists, will be of real

[11] Memoranda issued by these non-official entities are hard enough to find even in the year they are issued, and in later years would be virtually impossible to track down. The hard job of collecting them, and also the official memoranda as well, is carried out each year by Elisabeth McK. Scott, Executive Secretary of the New York Legislative Service; she "invented" the Annual in 1946 and has been its guiding spirit ever since. Mr. Breuer, in his comprehensive article on New York legislative materials cited at footnote 1 above, says that the Annual is "the first attempt at a permanent record of primary source material relating to state laws."

aid to you, for it will identify the entity which has sponsored the bill. (The official "Laws of New York," printed by the Williams Press each year in bound volume form, also contains these "Notes," although the same entity's paper-back pamphlets issued currently during each Session do not.)

For example, approximately 130 of the 992 bills enacted in 1958 had a "Note" appended to them. Most of the "Notes" are not as long as the Law Revision Commission and the Judicial Conference "Notes" already described; rather, they merely identify the entity which prepared and sponsored the bill. For example, a "Note" will say: "The foregoing legislation was prepared under the direction of the New York State Banking Department and was introduced at its request," or "This bill was prepared under the direction of The City of White Plains and is introduced at its request." But when the originating entity is thus identified, you are of course 75% of your way down the road to obtaining whatever background material there is.

If you can't find a pertinent "Note" in the above two session laws volumes, you can still examine the actual bill itself to see if it contains a "Note" identifying the sponsor. The bills introduced in prior years are preserved in various law libraries, such as the Library of The Association of the Bar of the City of New York (which has all bills back to 1900 and beyond). You of course must seek the bill through its Introductory Number, but you can obtain such Introductory Number through the cross reference table which appears in the appropriate annual volume of the New York Legislative Record and Index, published by The Legislative Index Company, Albany, New York.[12]

In the years prior to 1954 or so, you won't find many statutory "Notes" appended to the end of bills. It is apparently something which only in recent years is being done to any great extent. Also, apparently, only what I have called a Governmental entity can get a "Note" appended to its bill. Nor is there any consistency

[12] The New York Legislative Record and Index lists every bill introduced, and the name of the legislator who introduced it, but does not give any further information, such as sponsoring entity, etc., which would aid in obtaining background material.

even in the case of a Governmental entity; for example, several of the bills sponsored by the Department of Education in 1958 have a "Note" appended to that effect, while others similarly sponsored by that Department have no "Note" appended.

I should add that McKinney's annual Session Laws volume is also helpful because, in addition to printing the "Notes" attached to bills, it prints the Governor's Annual Message and (except in 1958, when apparently limited by reasons of space) also all of the Governor's special messages, approval messages and veto messages, and a good many of the memoranda issued by what I have called, above, official or governmental entities which have sponsored bills.

Governor's Bill Jackets

If you have still not identified the source of your enactment, and thus can obtain no background on it, your next step would be to send to the Legislative Reference Library of the State Library at Albany for the so-called Governor's bill jacket pertaining to your enactment.

Each year, for each and every bill which is before the Governor for action, a separate envelope is maintained, into which is placed all supporting (and opposing) material which is sent to the Governor or his Counsel on the bill. A jacket will usually contain (a) a memorandum from the sponsoring entity, (b) the above-mentioned required explanatory letter from the legislator who introduced the bill, (c) supporting or opposing memoranda from bar associations, the Citizens Union, and other entities which comment more or less dispassionately on pending legislation, and (d) letters or memoranda from lobby groups or private individuals who may urge or oppose the legislation in not-at-all dispassionate fashion.

The bill jacket is a kind of "surprise package," and you won't know what it contains until you look. Another interesting thing is that, although each bill jacket is utterly unique and irreplaceable (there is no other copy), the State Library will entrust it to the U. S. mails, and to *you* (if you are a member of the Bar);

microfilming of the bill jackets, however, is now under way.

Presently, the bill jackets are available for the period 1921 to 1948. According to the State Library, those for 1949 will be made available on July 1, 1959; and on July 1st of each successive year bill jackets for a succeeding year will be opened for public use, "this entire collection being freed from restriction on July 1, 1964." But I understand there is now a good chance that, in the next few weeks, arrangements may be worked out whereby (a) the present 10-year waiting period, pertaining to the bill jackets of the last six years of Governor Dewey's administration (1949–1954), will be removed entirely, and (b) the bill jackets of Governor Harriman's administration will be available for inspection *in Albany* (although not mailed out) by qualified persons having a good reason for inspection. Thus even for bill jackets as recent as 1958, you should communicate with the Legislative Reference Library of the State Library at Albany, to find out what your chances of inspection are.

When the bill jackets were first made available (in 1943), several persons who in earlier years had written what they felt to be somewhat confidential letters to the Governor or his Counsel on a bill were distressed to know that those letters were in the bill jacket and now available to public inspection. In recent years, at the close of each Session, the staff of the Governor's Counsel has gone through each bill jacket and winnowed out any of such material which is more confidential than informative, so to speak.

Other Background Materials

Briefly stated, other sources of background material are:

(1) Transcribed reports of public hearings held on bills. Such transcribed reports are rare; the New York State Library has a list of those which are available.

(2) If the bill as finally enacted has been amended, the earlier version or versions of the bill may be of aid on intent. Also, a somewhat similar bill which failed in a *prior* Session of the Legislature may be of significance.

(3) Many bills are vetoed with a so-called "veto message" from

the Governor (over 150 in 1958). The veto message's discussion of defective language in the vetoed bill, which defective language is eliminated or altered in a later year when the (corrected) bill is finally enacted, may be of aid in interpreting the bill finally enacted.

(4) If the enactment was not passed too many years ago, you can ask the Senator or Assemblyman who introduced it for background material on the originating entity, intended meaning, etc.

JUDICIAL USE OF BACKGROUND MATERIALS

Now that I have listed various background materials and where they can be found, I want to discuss briefly how much attention a court will pay to them.

Apart from some isolated dicta and broad canons of statutory construction of dubious vitality, the New York courts have neither established principles governing the use of legislative history nor attempted to evaluate in general terms the relative weight to be accorded different types of source materials. Mr. Justice Breitel, in an excellent series of articles entitled "Courts and Lawmaking," published in the New York Law Journal on December 8–12, 1958, urges an acknowledged pluralistic approach to statutory interpretation, pointing out that the use of varying background sources must turn on the type of statute under consideration and on a realistic appraisal of the workings of the legislative process. Mr. Justice Breitel noted an "absence in the courts of realistic standards reflecting what is known by them about the legislative process, but is not expressed, and what is done by the courts about legislation, but is not admitted." For the practitioner, it is important to know what use the courts have in fact made of source material, keeping in mind that the use of particular types of legislative history has varied from case to case and that even apparently consistent applications may be reappraised when different types of statutes are involved.

At the outset, you should recognize that the "plain meaning rule" is very much alive in New York; that is, the courts frequently state that if the language of a statute is clear and unam-

biguous, resort to other means of interpretation is not permissible because no interpretation is required.[13] However, even in the enunciation of the rule, the door has been opened for some evidence of legislative intent. For the courts will try to give effect to legislative intent, and obscurity of meaning, calling for judicial interpretation, may spring from uncertainty of intent as well as uncertainty of expression.[14] If the plain meaning rule assumes that the Legislature has in fact clearly expressed its intent in the words and language employed in the statute,[15] then perhaps a somewhat circular process is involved, in which evidence of legislative intent may itself determine whether the plain meaning rule will operate to exclude consideration of such evidence. In any event, even where the clarity of the statute leads a court to reject expressly any inquiry into legislative intent, the court often proceeds to make such inquiry in support of its decision.[16] In addition, there are well established exceptions to the plain meaning rule—for example, where a literal construction would produce an absurd, incongruous or unjust result, the courts are reluctant to impute such an intent to the Legislature and will strive to find a more reasonable interpretation.[17]

If you are faced with litigation, then, the plain meaning rule, whatever barrier it initially seems to present, is no reason for not assembling and presenting all available background materials bearing on the interpretation of the statute involved. As indicated, a statute which at first may seem to the court to be unam-

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13 *E.g.*, *Meltzer* v. *Koenigsberg*, 302 N.Y. 523, 525 (1951); *Daniman* v. *Board of Education*, 306 N.Y. 532, 543 (1954); see *Sharkey* v. *Thurston*, 268 N.Y. 123, 127–28 (1935). But see *People* v. *Oliver*, 1 N.Y. 2d 152 (1956).

14 *In the Matter of Meyer*, 209 N.Y. 386, 389 (1913); see *H. Kauffman & Sons* v. *Miller*, 298 N.Y. 38, 42–45 (1948).

15 See *McCluskey* v. *Cromwell*, 11 N.Y. 593, 601–02 (1854); *In the Matter of Will of Smathers*, 309 N.Y. 487, 494 (1956).

16 See *In the Matter of Rathscheck*, 300 N.Y. 346, 350–51 (1950); *New York Ambassador, Inc.* v. *Board of Standards and Appeals*, 114 N.Y.S. 2d 901 (Sup. Ct. 1952); *In the Matter of Berson*, 283 App. Div. 190 (3d Dep't. 1953); *cf. New Amsterdam Casualty Co.* v. *Stecker*, 3 N.Y. 2d 1 (1957).

17 See *United Parcel Service* v. *Joseph*, 272 App. Div. 194, 201 (1st Dep't. 1947); *Flynn* v. *Prudential Ins. Co. of America*, 207 N.Y. 315, 318–19 (1913); *Breen* v. *N. Y. Fire Dep't. Pension Fund*, 299 N.Y. 8, 19 (1949); *People* v. *Oliver*, 1 N.Y. 2d 152 (1956); *cf. Archer* v. *Equitable Life Assur. Soc'y*, 218 N.Y. 18, 22 (1916); *River Brand Rice Mills, Inc.* v. *Latrobe Brewing Co.*, 305 N.Y. 36, 42–44 (1953).

biguous may lose its clarity and preciseness when viewed in the context of relevant background material. The rule is, after all, primarily a matter of judicial self-restraint,[18] and the court should at least be given the opportunity of reading the background materials even though it may later determine that it could not be influenced thereby.

Perhaps the most persuasive background sources which have been accepted by the courts are the Recommendations of the Law Revision Commission[19] and the Judicial Council,[20] the reports of State commissions or other official entities engaged in statutory revision,[21] and the reports of similar commissions[22] and joint legislative committees[23] submitting formal reports, pursuant to statute, to the Legislature. There is little hesitation in considering such official recommendations or reports as strongly indicative of the legislative purpose and appropriately useful not only in determining general legislative intent but also in deciding specific questions of construction.[24] The courts accord simi-

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18 But see *General Phoenix Corp.* v. *Malyno*, N.Y.L.J., Feb. 23, 1956, p. 6 (Sup. Ct. 1956) (rejecting background materials as hearsay).

19 See, *e.g.*, *People* v. *Marinic*, 2 N.Y. 2d 181, 184–85 (1957); *Vanderbilt* v. *Vanderbilt*, 1 N.Y. 2d 342, 349–50 (1956); *Garzo* v. *Maid of the Mist Steamboat Co.*, 303 N.Y. 516 (1952); *Goines* v. *Pennsylvania R.R.*, 179 N.Y.S. 2d 960 (1st Dep't. 1958); *Fontheim* v. *Third Ave. Ry.*, 257 App. Div. 147 (1st Dep't. 1939); *Varga* v. *Credit-Suisse*, 2 App. Div. 2d 596, 598 (1st Dep't. 1956).

20 See, *e.g.*, *O'Connor* v. *Papertsian*, 309 N.Y. 465, 474 (1956); *Arnold* v. *Nat'l Plastikwear Fashions, Inc.*, 6 App. Div. 2d 411 (1st Dep't. 1958); *Cahen* v. *Boyland*, 1 N.Y. 2d 8, 13 (1956); *Shippey* v. *Berkey*, 6 App. Div. 2d 473 (3d Dep't. 1958); *Matter of Moroney*, 203 Misc. 557 (Surr. Ct. 1952).

21 See *de Baillet-Latour* v. *de Baillet-Latour*, 301 N.Y. 428, 432–33 (1950); *Seneca County* v. *State*, 47 N.Y.S. 2d (Ct. Cl. 1942), *aff'd*, 266 App. Div. 815 (4th Dep't. 1943), *aff'd*, 292 N.Y. 501 (1944); *Manice* v. *Manice*, 43 N.Y. 303, 375 (1871).

22 See *e.g.*, *People* v. *Prosser*, 309 N.Y. 353 (1955); *In the Matter of Estate of Sadowski*, 246 App. Div. 490 (4th Dep't. 1935); *In the Matter of the Estate of Curley*, 151 Misc. 664, 668 (Surr. Ct. 1934), *modified*, 245 App. Div. 255 (2d Dep't.), *aff'd*, 269 N.Y. 548 (1935); *In the Matter of the Estate of Greenberg*, 141 Misc. 874, 882 (Surr. Ct. 1931), *aff'd*, 236 App. Div. 733 (2d Dep't. 1932), *aff'd*, 261 N.Y. 474 (1933); *People* v. *Besser*, 207 Misc. 692 (Gen. Sess.), *rev'd sub nom.* People *ex rel. Besser* v. *Ruthazer*, 1 Misc. 2d 663 (Sup. Ct. 1955), *rev'd*, 3 App. Div. 2d 137 (1st Dep't. 1957).

23 See *Ahern* v. *South Buffalo Ry.*, 303 N.Y. 545, 554 (1952); *Consolidated Laundries Corp.* v. *Roth*, 241 App. Div. 48, 50 (1st Dep't. 1934); *Howie* v. *McKenzie*, 116 Misc. 117 (Sup. Ct. App. T. 1921).

24 *E.g.*, *American Historical Soc'y* v. *Glenn*, 248 N.Y. 445, 451–52 (1928); *Interchemical Corp.* v. *Mirabelli*, 269 App. Div. 224, 227 (1st Dep't. 1945).

lar treatment to the statutory "Note" appended to the actual bill enacted and briefly summarizing its purpose,[25] although some lower courts have sometimes seemed to read an appended Note as if it were actually a part of the statute under consideration.[26] It is questionable, however, whether the court will rely upon the basic Study which may accompany the official Recommendation if that Study (unlike those of the Judicial Council) was not prepared *by* the recommending entity but rather by an independent researcher.[27]

When legislation is initiated by a Department or agency of the State, the courts appear readily to accept the Department's or agency's supporting memorandum (which, as shown earlier, usually accompanies and explains the bill) as evidence of the general purpose of the statute,[28] and, to some extent, in construing the particular language involved.[29] But such memoranda are perhaps more vulnerable to the plain meaning rule[30] than the more detailed and carefully prepared report of, for example, a Joint Legislative Committee.

When a bill has reached the floor of the Legislature, there is the difficulty, which I have mentioned, of the unavailability of any complete or published record of the debates. If partial transcripts of debates are obtained and submitted, courts are likely to consider such material as indicative of legislative intent only to a very limited extent, i.e., such debates may be useful in determining the general evil against which a particular statute is

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25 See *In the Matter of Estate of Trevor*, 309 N.Y. 389, 394 (1955); *Fisher* v. *State Retirement System*, 299 App. Div. 315 (3d Dep't. 1952), *aff'd*, 304 N.Y. 899 (1953); *In the Matter of Will of Mayers*, 299 N.Y. 388, 397 (1949); *In the Matter of Estate of Simpson*, 176 Misc. 790 (Surr. Ct.), *aff'd*, 262 App. Div. 1001 (1st Dep't. 1941); *In the Matter of Estate of Miranda*, 151 Misc. 459 (Surr. Ct. 1934).

26 See *In the Matter of the Estate of Quenzer*, 152 Misc. 796, 798 (Surr. Ct. 1934); *In the Matter of the Estate of Pelcyger*, 171 Misc. 1016 (Surr. Ct. 1939).

27 See *Schwarz* v. *General Aniline & Film Corp.*, 305 N.Y. 395, 402 (1953); *Duffy* v. *State*, 197 Misc. 569 (Ct. Cl. 1950).

28 See *Pub. Serv. Coordinated Transp.* v. *State Tax Comm'n*, 180 N.Y.S. 2d 418, 421 (3d Dep't. 1958); *County of Erie* v. *City of Buffalo*, 4 N.Y. 2d 96 (1958); *cf. Four Maple Drive Realty Corp.* v. *Abrams*, 2 App. Div. 2d 753 (2d Dep't. 1956).

29 See *In the Matter of Estate of Benson*, 275 App. Div. 226, 230 (4th Dep't. 1949).

30 See *Fonda, J. & G. Ry.* v. *State Tax Comm'n*, 3 App. Div. 2d 178 (3d Dep't. 1957).

aimed, but not the particular meaning of the act.[31] But the courts might well accept the more direct relevance of legislative debates if the entire legislative proceedings were available, as is indicated by judicial treatment of the full records of constitutional conventions and of hearings before certain commissions.[32]

The amendment of a bill, during the course of its passage through the Legislature, can bear upon the proper interpretation of the bill as finally enacted.[33] There is even recent authority to the effect that, when a bill seeking to amend an existing statute fails altogether to pass the Legislature, some inference can be drawn from such failure as to the intended meaning of the existing statute.[34] However, in my own view, it is somewhat hard to understand how the failure of a particular bill to pass the Legislature can be considered directly relevant to the interpretation of the statute sought to be changed, at least when such bill was not reported out of committee or when there is no clear record of the reasons why the bill was not enacted.[35] Everyone knows that in a session of the Legislature many meritorious bills may be buried without full consideration in the last minute rush.

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31 See *Gerry* v. *Volger*, 252 App. Div. 217, 220–22 (4th Dep't. 1937); *Woollcott* v. *Shubert*, 217 N.Y. 212, 221–22 (1916); *cf. People* ex rel. *Fleming* v. *Dalton*, 158 N.Y. 175, 184, 185 (1899).

32 See *In the Matter of Estate of Endemann*, 307 N.Y. 100, 106 (1954); *Lewkowicz* v. *Queen Aeroplane Co.*, 207 N.Y. 290 (1913), *affirming* 154 App. Div. 142 (1st Dep't. 1912); *Dorsey* v. *Stuyvesant Town Corp.*, 299 N.Y. 512, 530–31 (1949); *Broderick* v. *City of New York*, 295 N.Y. 363, 370–72 (1946); *Bazar* v. *Great Am. Indem. Co.*, 306 N.Y. 481, 487–88 (1954); *cf. Easley* v. *New York State Thruway Authority*, 1 N.Y. 2d 374, 377–78 (1956). But *cf. Woollcott* v. *Shubert*, 217 N.Y. 212, 221 (1916); *In the Matter of Morse*, 247 N.Y. 290, 303 (1928).

33 See *Travis* v. *American Cities Co.*, 192 App. Div. 16, 25–27 (1st Dep't. 1920), *aff'd*, 233 N.Y. 510 (1922); *Martin* v. *School Bd. of Long Beach*, 301 N.Y. 233, 237–39 (1950); *Broderick* v. *City of New York*, 295 N.Y. 363, 370–72 (1946); *In Re Schwimmer's Estate*, 49 N.Y.S. 2d 481 (Surr. Ct. 1944); *Woollcott* v. *Shubert*, 217 N.Y. 212, 221–22 (1916) (dictum).

34 *People* v. *Shaw*, 1 N.Y. 2d 30, 35 (1956); *Holmes Elec. Protective Co.* v. *City of New York*, 304 N.Y. 202, 206–07 (1952); *cf. New York Tel. Co.* v. *Pub. Serv. Comm'n*, 286 App. Div. 28, 33 (3d Dep't. 1955), *aff'd*, 309 N.Y. 569 (1956).

35 See *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950); *Order of Ry. Conductors* v. *Swan*, 329 U.S. 520, 529 (1947); *Ross* v. *Arbury*, 206 Misc. 74, 76–77 (Sup. Ct. 1954), *aff'd*, 285 App. Div. 886 (1st Dep't. 1955); *People* v. *Levenstein*, 309 N.Y. 433, 435 (1955); *Dorsey* v. *Stuyvesant Town Corp.*, 299 N.Y. 512 (1949) (failure of bills to pass considered in light of other background materials); *New York, L. & W. Ry.* v. *Roll*, 32 Misc. 321 (Sup. Ct. 1900).

There is also authority indicating that an appellate court should be reluctant to overrule lower court interpretations of a statute when bills designed to change that interpretation have been vetoed by the Governor.[36] But this seems to me to rest on the questionable assumption that the Governor's veto at a later session of the Legislature sheds light on the intent of the Legislature which in an earlier year passed the statute so interpreted by the lower courts.

The proper use of legislative source material becomes even more uncertain after a bill has been passed by the Senate and Assembly and submitted to the Governor. In so far as statutes are enacted in response to a proposal of the Governor, the Governor's message proposing such legislation may be properly considered in its interpretation.[37] But it may well be that a different rule should be applied to messages issued after the Legislature has acted. In performing his constitutional function of approving or disapproving legislation,[38] the Governor's actions are part of the legislative process and theoretically should be considered in determining legislative intent.[39] But approval and veto messages should be used cautiously and in light of the particular situation involved—if, for example, the Legislature passes two or more differing versions of a bill and thereby places the responsibility on the Governor to select among them,[40] then the Governor's approval and veto messages would be significant in determining intent. On the other hand, if the Governor construes a particular bill in his approval message it is difficult to impute that construction to the Legislature, although clearly the cumulative effect of the message and other background materials may be of importance.[41] Whatever their use in matters of particular statutory

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36 See *City of New York* v. *Bedford Bar & Grill, Inc.*, 2 N.Y. 2d 429 (1957).

37 See *Brooklyn Hosp.* v. *Donlon*, 309 N.Y. 520, 526–27 (1956); *cf. New York Tel. Co.* v. *Pub. Serv. Comm'n*, 309 N.Y. 569, 577 (1956).

38 N. Y. CONST. art. IV, §7.

39 See *Four Maple Drive Realty Corp.* v. *Abrams*, 2 App. Div. 2d 753 (2d Dep't. 1956); *cf. People* ex rel. *Yaras* v. *Kinnaw*, 303 N.Y. 224, 231 (1951).

40 See *Teeval Co.* v. *Stern*, 301 N.Y. 346, 362 (1950).

41 See *County of Erie* v. *City of Buffalo*, 4 N.Y. 2d 96 (1958); *Chatlos* v. *McGolderick*, 302 N.Y. 380 (1951); *Squadrito* v. *Griebsch*, 1 N.Y. 2d 471, 476 (1956); *Dunleavy* v. *Walsh, Connelly, Senior & Palmer*, 309 N.Y. 8, 11 (1955); *Gilbert* v. *Case*, 3 App. Div. 2d 930, 931 (2d Dep't. 1957).

interpretation, however, the Governor's approval messages are significant in determining the general legislative purpose of a statute, and this may be of crucial importance if the court is called upon to determine, for example, whether a statute is to be applied retroactively,[42] or whether a prior statute has been repealed by implication.[43]

The memoranda which I have mentioned as usually submitted to the Governor by the introducing legislator of a bill passed by the Legislature are analogous to, but perhaps less persuasive than, the Governor's approval messages. The courts will not impute to the Legislature the intent expressed in such memoranda, at least where there is no showing that the other legislators were aware of such intent.[44] If, of course, it can be shown that a particular memorandum was available to the other legislators prior to enactment of the bill, there would be some basis, however theoretical, for inferring intent[45] and, in any event, the supporting memorandum should be considered in determining the general context in which the bill was enacted and given, in this respect, whatever weight it deserves.[46]

Once we leave what might be called the *official* or semi-official background materials, discussed just above, it is even more difficult to tell you what weight a court will give to the memoranda by *unofficial* entities recommending, supporting or opposing bills. When qualified professional views are represented, such as in the contemporaneous reports and bulletins of bar association committees, the opinions expressed are likely to be found relevant in determining both the existing law and the probable intention

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42 See *People* v. *Oliver*, 1 N.Y. 2d 152 (1956); *Noel Associates, Inc.* v. *Merrill*, 184 Misc. 646 (Sup. Ct. 1944); *cf. Garzo* v. *Maid of the Mist Steamboat Co.*, 303 N.Y. 516 (1952).

43 See *Four Maple Drive Realty Corp.* v. *Abrams*, 2 App. Div. 2d 753 (2d Dep't. 1956).

44 *In the Matter of Delmar Box Co.*, 309 N.Y. 60, 67 (1955); *cf. Horn* v. *Klugman*, 112 Misc. 171, 177 (Munic. Ct.), *rev'd on other grounds*, 184 N.Y.S. 927 (2d Dep't. 1920). But *cf. In the Matter of Baldwin Trading Corp.*, 2 Misc. 2d 698 (Sup. Ct. 1956); *In the Matter of Estate of Byrnes*, 141 Misc. 346, 349 (Surr. Ct. 1931).

45 *Cf. Farrington* v. *Pinckney*, 1 N.Y. 2d 74, 88 (1956); *People* ex rel. *Fleming* v. *Dalton*, 158 N.Y. 175, 185 (1899).

46 See *Rothrock Syosset, Inc.* v. *Kreutzer*, 3 Misc. 2d 64 (Sup. Ct.), *rev'd on other grounds*, 2 App. Div. 2d 777 (2d Dep't. 1956).

of the Legislature in enacting changes.[47] When other private sources are involved, the New York cases indicate that such materials are relevant in determining the evil intended to be corrected and the general antecedent history of the statute,[48] but directly relevant to interpretation of the statute only when some direct connection with official legislative action can be shown.[49] On the latter point Mr. Justice Breitel has said in his articles mentioned above:

"Private reports and studies in connection with proposed legislation are significant, if, in fact, they were considered in the enactment of the legislation. This stems from the view . . . that there are different levels of legislative intention. Legislatures are free, and exercise the freedom, to delegate the responsibility for the development and drafting of legislation. If such reports and studies will be of assistance to the courts in determining the legislative intent and purpose, thus conceived, then they should be used. Of course, the fact is they are used."

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[47] See *Cherkis* v. *Impellitteri*, 307 N.Y. 132, 142–44 (1954); *Schwarz* v. *General Aniline & Film Corp.*, 305 N.Y. 395 (1953).

[48] See *Knapp* v. *Fasbender*, 1 N.Y. 2d 212, 219 (1956); *Bazar* v. *Great Am. Indem. Co.*, 306 N.Y. 481, 487–88 (1954); *Metropolitan Life Ins. Co.* v. *Durkin*, 301 N.Y. 376, 381 (1950).

[49] See *Travis* v. *American Cities Co.*, 192 App. Div. 16, 25–27 (1st Dep't. 1920), *aff'd*, 233 N.Y. 510 (1922); *County of Erie* v. *City of Buffalo*, 4 N.Y. 2d 96 (1958); *cf. Broderick* v. *City of New York*, 295 N.Y. 363, 370–72 (1946); *In the Matter of Estate of Byrnes*, 141 Misc. 364, 349 (Surr. Ct. 1931).

Committee Report

SPECIAL COMMITTEE ON THE ADMINISTRATION OF JUSTICE

REPORT ON RECOMMENDATIONS OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK FOR MODERNIZATION OF THE COURT STRUCTURE IN THE STATE OF NEW YORK

The recently published recommendations of the Judicial Conference of the State of New York for court modernization and administrative supervision of our courts have received the unanimous approval of this Committee. While we recognize that these recommendations could be improved upon in certain areas discussed below, this Committee is prepared to support actively legislation aimed at carrying out the recommendations of the Conference. We believe other professional and lay organizations which have been working for court reorganization in New York State should do likewise even though they too feel these recommendations do not solve our problems completely.

The fact that our state judiciary recognizes the urgent need for court reorganization and modernization and has reached substantial agreement on the basic features of a plan to achieve it is particularly encouraging to those who are interested in and have been working for a modern court system for New York State. It is hoped that the Conference will continue to provide leadership and will press for enactment at the coming session of the Legislature of the legislation necessary to carry out its recommendations.

Since its creation in 1953, this Committee has been in the forefront in the movement for a modern, efficient court system in this State. Through its publications and public statements, the Committee has endeavored to apprise both the profession and the public of the defects and inadequacies of our present judicial system and has laid down broad basic principles essential to any

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Editor's Note: This report and the resolution attached were unanimously approved at the Stated Meeting of the Association held on January 20, 1959.

court reorganization plan. Further, it has taken a position and commented upon all court reorganization proposals which have been put forward in the past three years. No purpose would be served by restating in detail its position; but the Committee does feel that certain recommendations of the Conference warrant mention and this Report will confine itself to that.

COURT STRUCTURE

We are particularly impressed with the Conference's recommendations for simplification of the court structure in New York City. This maze of separate trial courts, often with overlapping and conflicting jurisdiction, is to be reduced to five in number. The proposed new system of lower courts in New York City would both facilitate the work of the lawyers and judges and expedite the disposition of the persisting backlog of cases.

We continue to be unimpressed by the arguments of those who support a separate Surrogate's Court and in our judgment the abolition of the Surrogate's Court is a desirable reform, at least in New York City. It is common practice in many states to have probate functions handled by a trial court of general jurisdiction. Thus the "specialist" argument is met. It is widely believed that many of those who have insisted upon retention of the Surrogate's Court are motivated by political considerations, particularly patronage, and we think this public belief should be taken into consideration in evaluating the opposition to the inclusion of the probate function within the jurisdiction of the Supreme Court. Mr. Hunter Delatour dissents from the foregoing statement in its entirety.

We see merit in the recommendation of a statewide family court, although we have previously supported integration of family court matters in a separate division of the Supreme Court. The Conference recommendations in this regard achieve the desirable objective of concentrating substantially all aspects of the family problem in one court and for this reason we support them although they fall somewhat short of our prior recommendations. We recognize that consideration of the matters com-

ing before the family court calls for special talent and we urge the Conference to give careful consideration to the method of selecting judges for this court so as to provide judges who by virtue of experience and temperament are best qualified.

Because we are not sufficiently conversant with the functioning and problems of the lower courts upstate, we do not deem it appropriate to comment thereon, except to point out that the Conference recommendations which provide for consolidation of the lower courts upstate and elimination of part-time judges are consistent with our basic principles for court unification.

COURT ADMINISTRATION

This Committee has consistently recommended centralization and unification of the administrative functions of the courts. In our report entitled "Bad Housekeeping—The Administration of the New York Courts," published in 1954, we recommended the adoption of a system of court administration under the control of the judges. Our recommendation for the establishment of a Judicial Conference with authority and responsibility for the management of the courts of the State has, so far as legislation goes, met with only limited success. There is every reason to believe that within the framework of the recommendations of the Conference there can be achieved substantial centralization and unification of the non-judicial operations of the courts. The willingness of the judiciary to undertake responsibility for management of the courts is a great stride forward. We would hope that the legislation effectuating the recommendations of the Conference will be along the lines suggested in our 1954 report.

The provisions for the financing of the courts recommended by the Conference, although a substantial improvement over present practices, should be considerably strengthened. If realistic centralization is to be achieved in the administrative functioning of the courts, a single statewide budget for all of the courts should be fixed by the Legislature. The local taxing bodies should of course be heard on the question of court expenses assessable to their respective localities. However, we believe this can be accom-

plished within the framework of a single statewide budget by affording them an opportunity to submit comments and suggestions on that portion of the budget which relates to courts in their locality. We urge the Conference to give further consideration to this point of view.

COURT PROCEDURES

This Association has long been on record in favor of an overall revision and simplification of civil procedure and rules of court for all of the courts of this State. New York's system of having procedure laid down one-half by the Legislature and one-half by the justices of the Appellate Division, supplemented by local court rules, is manifestly unworkable and has created an overwhelming complex of archaic and disorganized statutes and general and local court rules. The United States Congress and the Legislatures of many States have achieved major procedural reform by vesting in the judiciary the power and responsibility for establishing court procedure and rules. We have consistently recommended that the courts be the repository of the rule-making power. The Legislature itself has already given this kind of power to many of the quasi-judicial boards and commissions which it has created; it has also given to the judicial branch the responsibility to enact rules of civil practice covering about one-half of the civil procedure field. We suggest that it now go the rest of the way. The Conference recommendation does not go quite this far, although it does suggest as one of two alternatives that the power be granted by constitutional provision to the Court of Appeals, subject always to revision by the Legislature. We would prefer to see the authority to make rules governing the administration of the courts and the practices and procedures in the courts vested solely in the courts where it properly belongs. Mr. Stuart Updike disagrees with our views and favors the Conference recommendation.

The recommendations of the Conference could be improved in certain respects, but we are firmly convinced that its proposals

are in general so sound that it would be a grievous mistake for us or anyone to oppose the whole plan for any particular principle.

We therefore respectfully submit the following resolution:

> RESOLVED, that The Association of the Bar of the City of New York endorses the recommendations of the Judicial Conference of the State of New York for modernization of the court structure in the State of New York and urges their prompt enactment by the Legislature.

SPECIAL COMMITTEE ON THE ADMINISTRATION OF JUSTICE

WILLIAM C. CHANLER, *Chairman*
ALBERT C. BICKFORD
BRUCE BROMLEY
PORTER R. CHANDLER
HUNTER L. DELATOUR
JOSEPH E. DYER
FRANCIS H. HORAN
HAROLD M. KENNEDY
NEWMAN LEVY
ALFRED P. O'HARA
RICHARD J. POWERS
STUART N. UPDIKE

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